

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: NARRAGANSETT BAY COMMISSION :
GENERAL RATE FILING : DOCKET NO. 3162

REPORT AND ORDER

On June 29, 2000, the Narragansett Bay Commission (“NBC”) filed an application with the Rhode Island Public Utilities Commission (“Commission”) seeking a general rate increase in its existing rate schedules pursuant to R.I.G.L. §39-3-11. The proposed rates were designed to generate total revenues of \$39,638,496 and, if approved as filed, would increase NBC’s present revenues by \$10,089,441, or 34.1%. An effective date of July 29, 2000 was requested. The Commission suspended the effective date of the proposed rate increase at an open meeting on July 13, 2000.

The instant rate case filing represents NBC’s third such filing in the last seven years. The following table provides a brief history:

<u>Docket No.</u>	<u>Filing Date</u>	<u>Increase Requested</u>	<u>Increase Allowed</u>	<u>Authorized Revenues</u>
2132	9/24/93	\$2,325,653	withdrawn on 12/2/93	
2216	6/27/94	\$8,161,795	\$5,332,025	\$32,098,454 ¹

I. NBC

In support of its filing, NBC submitted prefiled testimony of Paul Pinault, Executive Director of NBC; Raymond Marshall, Deputy Director of NBC; Paul E. Nordstrom, P.E., Director of Operations and Engineering for NBC; Walter E. Edge, Jr., an accountant retained by NBC; Joseph Pratt, Vice President of The

¹ The Commission reduced NBC’s annual revenue by \$1,733,272 effective on July 1, 1997.

Louis Berger Group, Inc., which has been retained by NBC to provide management services for the Combined Sewer Overflow Abatement Program (“CSO project”); David Aimen, a manager at The Louis Berger Group, Inc, which has also been retained by NBC to review the potential impact of the CSO project’s costs on NBC’s ratepayers; Karen L. Giebink, Director of Administration and Finance for NBC; and Lisa Jeffries, NBC’s Customer Service Manager.

A. Paul Pinault, NBC’s Executive Director.

In his pre-filed testimony, Mr. Pinault generally explained that NBC’s rate filing is primarily driven by an increase in debt service required to fund NBC’s approved Capital Improvement Program (“CIP”), which includes the CSO project and represents approximately 64% of the proposed rate increase.² Also, eight percent of the proposed increase is needed to eliminate revenue shortfalls caused by lower consumption figures.³ Lastly, approximately 28% of the proposed rate increase is due to increases in the costs of operating and maintaining NBC’s facilities.⁴

Mr. Pinault stated that the most important CIP project to be undertaken by NBC at this time is the CSO project, and the second most important project is Contract 807 for improvements to the Bucklin Point Wastewater Treatment Facility (“Bucklin Point”).⁵ With regard to the CSO project, he explained that in some older urban centers, a single (or combined) sewage system handles all

² NBC’s Ex. 3: Pinault’s Pre-filed Testimony, p. 3.

³ Id.

⁴ Id.

wastewater flows as well as stormwater runoff. During periods of heavy rainfall, the combined volumes of wastewater flows and stormwater runoff can exceed the capacity of the sewer system, resulting in overflows of untreated stormwater and wastewater into “receiving waters”.⁶ The federal Clean Water Act requires NBC to eliminate or mitigate the 70 combined sewer overflows in its service areas.⁷ The Rhode Island Department of Environmental Management (“DEM”) is delegated the authority to carry out the federal mandates of the Environmental Protection Agency (“EPA”).⁸ NBC’s consent agreement with DEM dated December 15, 1992 sets forth a schedule for the CSO project. NBC’s failure to comply with the schedule will subject NBC to administrative penalties of \$10,000 per day, per violation.⁹ The estimated costs for Phase I of the CSO project is \$227 million.¹⁰

To fund the CSO project, Mr. Pinault explained that the proposed state budget for 2001 included a \$30 million referendum to issue state funded general obligation bonds on behalf of NBC, as well as a budget amendment to include a \$60 million referendum to issue state funded general obligation bonds on behalf of the Rhode Island Clean Water Finance Agency (“RICWFA”). RICWFA provides loans at a subsidized rate of zero percent to qualifying organizations for water pollution abatement projects.¹¹ On the federal level,

⁵ Id., pp. 4-5.

⁶ Id., p. 5.

⁷ Of the 70 CSO’s in NBC’s service territory, 42 are located in Providence, 20 in Pawtucket, 7 in Central Falls and 1 at Bucklin Point.

⁸ Id., pp. 5-6.

⁹ Id., p. 6.

¹⁰ Id.

¹¹ Id., pp. 6-7.

the Rhode Island Congressional delegation has consistently requested federal appropriations to assist in defraying the costs of the CSO project.¹² In addition, \$19 million in authorized state-funded Bay Bonds is expected to be issued for the CSO project over the next two years.¹³

Mr. Pinault also explained that in recent years NBC has implemented a number of cost saving measures. First, as a result of recent legislation, NBC has custody of its own funds and pays its own bills, resulting in more than \$120,000 savings in state indirect costs.¹⁴ Second, NBC has entered into a four-year agreement to purchase electricity from Select Energy, reducing electric costs by more than \$700,000.¹⁵ Third, NBC's changes in operations, including those related to the chemicals applied to effluent, have resulted in cost savings of more than \$850,000.¹⁶ Fourth, NBC solicited bids for its insurance policies, and negotiated lower rates which resulted in savings of over \$100,000 annually.¹⁷ Lastly, NBC received cost savings for subcontracting the management functions at Bucklin Point in July 1999.¹⁸

As for NBC's operation and management, Mr. Pinault emphasized that NBC is not seeking any additional personnel positions and is seeking funding for 241 positions instead of 253 positions as authorized by the Commission in Docket No. 2216.¹⁹ In an effort to improve efficiency and create cost savings,

¹² Id., pp. 7-8.

¹³ Id.

¹⁴ Id., p. 9.

¹⁵ Id., p. 10.

¹⁶ Id., p. 10.

¹⁷ Id., pp. 10-11.

¹⁸ Id., p. 11.

¹⁹ Id., p. 11.

NBC evaluated the consolidation of its employees by changing the physical location of NBC's staff.²⁰

Next, Mr. Pinault explained that the Environmental Enforcement Fund ("EEF") funds projects such as the transplanting of shellfish, a survey project of the Woonasquatucket River, and the Blackstone Valley River Keeper Program, and that the EEF is funded by civil and administrative enforcement actions initiated against industrial and commercial users for violation of NBC Rules and Regulations.²¹

In conclusion, Mr. Pinault highlighted the national awards received by NBC, and noted that even with the proposed rate increase resulting in an average annual residential bill of \$178.44, NBC would still have the seventh lowest wastewater rate when compared to similar metropolitan areas in the nation.²²

B. Raymond Marshall, NBC Deputy Director.

In his pre-filed testimony, Mr. Marshall explained how NBC reached its decision to subcontract a portion of the operation and maintenance of Bucklin Point.²³ The Construction/Engineering Operations subcommittee of NBC decided to subcontract the operation and maintenance activities at Bucklin Point because the cost per million gallons of wastewater treated was twice as much at Bucklin Point compared to that at Field's Point Wastewater Facility

²⁰ Id., pp. 12-13.

²¹ Id., p. 15.

²² Id., pp. 20-21.

²³ NBC Ex. 4: Marshall's Pre-filed Testimony , p. 2.

("Field's Point").²⁴ Consequently, NBC issued a Request for Qualification/Proposals ("RFQ/P"), and Professional Services Group ("PSG") was selected.²⁵ In July 1999, NBC entered into a three-year subcontract with PSG for the supervisory portion of the operation and maintenance at Bucklin Point. As a result, PSG reduced the number of NBC employees at Bucklin Point from 54 to 31 and 6 PSG management employees, with estimated savings for fiscal year 2000 of approximately \$600,000.²⁶

C. Paul Nordstrom, NBC's Director of Operations & Engineering.

In his pre-filed testimony, Mr. Nordstrom addressed the status of NBC's sludge disposal operations, as well as changes in the disinfection operations and chemical usage at the Bucklin Point and Field's Point treatment facilities, and NBC's Septage Waste Discharge Program.²⁷ In 1993, the EPA promulgated stricter federal regulations for sludge disposal referred to as "503 regulations".²⁸ As a result, the Bucklin Point landfill was closed in 1996, and short-term sludge disposal services have been provided by an outside vendor, NETCO.²⁹ At Field's Point, on-site incineration remains the process for sludge disposal, but improvements to the incinerator have been recommended.³⁰ Mr. Nordstrom explained that NBC is nearing agreement with the Rhode Island Resource Recovery Corporation ("RIRRC") on a 20-year contract under which

²⁴ Id. p. 3.

²⁵ Id. pp. 3-4.

²⁶ Id., pp. 5-6.

²⁷ NBC Ex. 5: Nordstrom's Pre-filed Testimony, p. 2.

²⁸ Id., p. 3.

²⁹ Id., pp. 3-4, and 6.

³⁰ Id., pp. 6-7.

the RIRRC and its outside vendor would assume the risk of designing, building and operating a sludge processing facility to process and dispose of NBC's sludge at a guaranteed price.³¹ As for disinfection operations at Field's Point and Bucklin Point, Mr. Nordstrom noted that Bucklin Point utilizes sodium hypochlorite, and at Field's Point, NBC has switched from the use of chlorine gas to more expensive sodium hypochlorite, because of new OSHA regulations promulgated in 1999 regarding the use of chlorine gas.³² Lastly, Mr. Nordstrom stated that NBC has a septage receiving station in Lincoln, R.I. and later disposes of the septage at Bucklin Point, and noted a dramatic increase in the volume of septage disposal at Bucklin Point in the last few years. He attributed this increase to the fact that NBC has the lowest septage disposal rates in Rhode Island and, by law, is also required to accept septage from outside its service territory and outside Rhode Island.³³ As a result, Mr. Nordstrom urged that the septage disposal tariff be increased from \$25 per thousand gallons to \$35 per thousand gallons to encourage septage haulers to use other disposal facilities.³⁴

D. Walter Edge, CPA.

In his pre-filed testimony, Mr. Edge developed NBC's test year, which is the fiscal year ending June 30, 1999, and NBC's rate year, which is calendar year 2001.³⁵ Mr. Edge identified three reasons for NBC's rate increase.³⁶ The

³¹ Id., pp. 7-11.

³² Id., pp. 9, 11.

³³ Id., p. 13.

³⁴ Id., pp. 14-15.

³⁵ NBC Ex. 2: Edge's Pre-filed Testimony, p. 1.

³⁶ Id., p. 6.

first reason is debt service for NBC's CIP, and in particular the CSO project.³⁷ The second reason is the failure of NBC to reach gross revenue levels approved by the Commission in previous dockets.³⁸ The third reason is the increase in operating costs related to salaries, benefits and operational changes at NBC's facilities.³⁹

On the subject of NBC's test year, dating from July 1, 1998 to June 30, 1999, Mr. Edge outlined four ratemaking adjustments he made to the test year expenses, based on Generally Accepted Accounting Principals ("GAAP"): 1. recording capital items purchased in the test year in the amount of \$402,719; 2. adding to the cost of service principal payments on long term debt in the amount of \$3,260,161; 3. removing depreciation in the amount of \$4,484,431 and all but \$9,691 of annual amortization expenses totaling \$113,312; and 4. recording capitalized leases in the amount of \$71,448.⁴⁰

Mr. Edge also made sixteen normalization adjustments to NBC's test year revenues and expenses, consisting of: 1. reducing miscellaneous revenue by \$34,745; 2. excluding \$5,297 of interest income applicable to the EEF because it is not subject to Commission regulation; 3. excluding \$17,642 in revenues and \$42,194 in expenses related to the EEF; 4. removing the EPA operating grant of \$47,967 and related expenses of \$43,166 because it is a non-recurring item; 5. reducing dues and subscriptions by \$6,000 for membership fees; 6.

³⁷ Id.

³⁸ Id., pp. 6-7.

³⁹ Id., p. 7.

⁴⁰ Id., p. 9.

increasing the telephone account by \$12,483 due to cell phone bills; 7. increasing printing and billing by \$9,010 to record a Vestcom invoice; 8. reducing architect services of \$42,778 relating to the purchase of the Hudson property which is a non-recurring event; 9. increasing the chemical account for sodium bisulfate by \$44,763; 10. Reducing the rental-outside property account by \$40,400, which represents a portion of the CPI adjustment for the Foundry building; 11. increasing the insurance account by \$33,930 to reflect the payment of an insurance invoice for fiscal year ending 1999 paid in 1998; 12. reducing land closure costs by \$157,564 for landfill road repaving and fence repair which should not recur in the rate year; 13. eliminating \$31,905 of interest income not available to NBC for operations; 14. eliminating \$369,268 in non-recurring expenses, such as the payment of \$25,000 to a shell fisherman, a fire clean up charge of \$4,890, and capitalized Y2K expenses of \$339,378; 15. reducing residential flat revenue to remove an East Providence payment in the amount of \$40,535; and 16. removing the arbitrage expense amount of \$35,424 because arbitrage expenses are paid with bond funds.⁴¹ Applying total adjustments of \$1,500,023 to test year expenses of \$28,453,554, Mr. Edge arrived at an adjusted test year expenses total of \$26,953,531⁴²

With regard to the development of rate year revenues, Mr. Edge first analyzed NBC's revenues. Mr. Edge noted that NBC's total revenues have remained relatively flat over the past three years although there have been

⁴¹ Id., pp. 10-12.

⁴² Id., Schedule WEETY-1, p. 5.

fluctuations in individual revenue accounts.⁴³ By analyzing the consumption information for NBC in the last three years, Mr. Edge concluded that there should be no consumption revenue growth adjustment for the rate year because consumption has been decreasing.⁴⁴ As for other test year revenue accounts, Mr. Edge adjusted them as follows: 1. small accounts with income of less than \$100,000 were left at adjusted test year levels; 2. discharge permit fees remained at the level of \$896,150 because there is limited room for increase; 3. septage income was set at the test year level of \$492,917 in anticipation that the increase in the rate will cause the revenue to level off; 4. interest income was normalized to remove interest that is unavailable to NBC for its operations and therefore the interest revenue was set at \$335,592, the test year amount; 5. late charge revenue was set at \$550,000 reflecting minor growth above the test year.⁴⁵ Accordingly, Mr. Edge calculated adjusted test year revenues at \$29,339,542.⁴⁶

In his review of NBC's expenses, Mr. Edge discussed many of the accounts he analyzed when making adjustments to test year accounts. The personnel service accounts were increased by Mr. Edge to \$13,711,248 from the adjusted test year amount of \$12,282,201.⁴⁷ For the 41 accounts that had balances in the test year below \$100,000, Mr. Edge left these accounts at test levels.⁴⁸ As for the accounts relating to Bucklin Point operations and the

⁴³ Id., p. 13.

⁴⁴ Id., p. 16.

⁴⁵ Id., pp. 18-19.

⁴⁶ Id., p. 19; Schedule WEERY-1.

⁴⁷ Id., p. 13; Schedule WEERY-3, p. 1.

⁴⁸ Id., p. 13.

management agreement with PSG, Mr. Edge increased the rate year amount to \$3,617,249 from the adjusted test year total of \$2,294,022.⁴⁹ In the area of capital outlay accounts, Mr. Edge noted that NBC is requesting a level of expenditure in the amount of \$728,021 and is funding only 241 personnel positions instead of the 254 positions allowed for in NBC's last rate case.⁵⁰ In the area of debt service, Mr. Edge increased the amount from the adjusted test year amount of \$6,141,143 to \$13,782,565 for the rate year.⁵¹ As for special services, special clerical services was expected to decrease from \$93,792 to \$50,000, but the new Information Technology ("IT") program will increase the account entitled all other special services from \$124,148 to \$779,148.⁵² In accounts relating to repairs, Mr. Edge increased the amount for repairs to the incinerator from \$132,997 to \$190,000 and increased the amount for "other repairs" from \$281,431 to \$430,906.⁵³ In the account of rental-outside property, Mr. Edge determined that the amount will decrease from \$428,277 to \$326,427.⁵⁴ For fuel and electricity, Mr. Edge kept the electricity account at test year levels and increased the accounts relating to gas by \$190,821.⁵⁵ In the chemical accounts, Mr. Edge determined that the account involving chlorine/hypochlorite will decrease by \$306,592, and the polymer amount will decrease by \$116,141, but that the new chemical account for sodium bisulfate

⁴⁹ Id., p. 13; Schedule WEERY-10.

⁵⁰ Id., pp. 20-21.

⁵¹ Id., p. 21, Schedule WEERY-3, p. 4.

⁵² Id., p. 22, 28; Schedule WEERY 3, p. 3.

⁵³ Id., p.24; Schedule WEERY-3, p. 2.

⁵⁴ Id.

⁵⁵ Id., p. 25; Schedule WEERY-3, p. 2.

will increase by \$34,964 to total \$102,109.⁵⁶ The Y2K expenses were amortized over three years by Mr. Edge for an annual amount of \$438,342.⁵⁷

In the other accounts relating to operating supplies and expenses, Mr. Edge reduced the following accounts: 1. building and machine supplies by \$36,461; 2. the landfill closure account by \$9,737; 3. the rental equipment expense account by \$12,877 because NBC discontinued using two-way radios in 1999.⁵⁸ The account entitled indirect costs was eliminated because NBC assumed custody of its own funds, and the rate case expense was amortized over three years at \$66,666 per year.⁵⁹ The management and audit service account was increased by \$1,340,651 to \$1,395,414 in order to pay PSG to operate and manage Bucklin Point.⁶⁰

In conclusion, Mr. Edge determined that the rate year expenses would total \$39,043,858, an increase of \$12,090,327 above his adjusted test year expenses of \$26,953,531.⁶¹ Lastly, Mr. Edge recommended that all of NBC's restricted accounts, with exception of debt service, be eliminated.⁶²

As for rate design, Mr. Edge stated that he had filed a rate design that would eliminate the remaining \$1 million cross-subsidy between the Bucklin Point and Fields Point districts, resulting in one uniform set of tariffs for the entire NBC service area. Because obtaining accurate residential meter

⁵⁶ Id., pp. 25-26; Schedule WEERY-3, pp. 2-3.

⁵⁷ Id., p. 26; Schedule WEERY-3, p. 3.

⁵⁸ Id., pp. 26-27; Schedule WEERY-3, pp. 2-3.

⁵⁹ Id., p. 27; Schedule WEERY-3, p. 3.

⁶⁰ Id., pp. 28-29; Id.

⁶¹ Schedule WEERY-3, p. 4.

⁶² Id., p. 33.

readings remained a problem, NBC was proposing to institute a flat rate of \$178.44 per dwelling unit.

Mr. Edge stated that he reviewed the following rate studies prepared by Louis Berger & Associates, Inc.: (1) the 1998 “Stormwater Rate Survey”; (2) the 1998 “Stormwater Rate impact Analysis”; and (3) the 1999 “Summary of Financial and Rate Analyses.” From his review, Mr. Edge concluded that he did not have the time or information to develop a stormwater rate design for the rate year. He cited the need to identify impervious areas, determine the actual flow of run-off, and the run-off impact on the CSO in order to base a stormwater rate design based on an “Equivalent Residential Unit Method”.

Other rate design changes proposed by NBC included: (1) applying 200 gallons per day of use for a residential customer with well service; (2) a new abatement fee of \$36; and (3) an increase in the septage receiving station fee from \$25 to \$35 per gallon.

E. Joseph Pratt, The Louis Berger Group.

In his pre-filed testimony, Mr. Pratt updated the Commission on the development and present status of the CSO project.⁶³ Since 1992 Mr. Pratt’s firm, The Louis Berger Group, Inc. (“Berger”), has been under contract to NBC to provide management services for the CSO project, and Mr. Pratt has served as the Program Manager.⁶⁴ He explained that after an extensive process involving input from various stakeholder groups representing such sectors as industry, regulatory agencies and the environment, a plan consisting of three

⁶³ NBC Ex. 1: Pratt’s Pre-filed Testimony, p. 2.

phases was selected to remediate the combined sewer overflow problem. The plan calls for the construction of: five miles of underground storage tunnels, wet weather sedimentation/disinfection and treatment facilities at Bucklin Point, approximately 8.5 miles of combined sewer overflow interceptors, one wetland treatment center, and sewer separation in 12 areas.⁶⁵ This plan was approved by NBC's Board of Commissioners in 1997 and approved by DEM in 1999.⁶⁶

Utilizing the Engineering News Record Construction Cost Index ("ENRCCI"), a cost index developed to reflect the impact of labor and materials costs on the cost of construction, Mr. Pratt stated that the cost of Phase I of the CSO project was estimated to be \$227,189,587.⁶⁷ This estimate utilizes the ENRCCI projected for January 2004, the estimated mid-point of construction for Phase I, and the inclusion of the soft costs of construction such as management and security.⁶⁸ Mr. Pratt stated that NBC expects to advertise for approximately ten separate construction contracts in order to complete Phase I of the CSO project, and that construction will begin in the summer of 2001 and last for 66 months.⁶⁹ Mr. Pratt emphasized that the primary factor influencing the cost of Phase I of the CSO project will be the amount of competition in the construction marketplace at the time that each contract is bid.⁷⁰ Lastly, Mr.

⁶⁴ Id., p. 2.

⁶⁵ Id., pp. 4-5.

⁶⁶ Id., p. 5-6.

⁶⁷ Id., pp. 7-8.

⁶⁸ Id., p. 7.

⁶⁹ Id., p. 9.

⁷⁰ Id.

Pratt noted that responsibility for overall program management of Phase I of the CSO project will be retained by Berger, and that it has already hired a joint venture consisting of Gilbane Company and Jacobs Associates to act as Construction Manager for the CSO project.⁷¹ Lastly, Mr. Pratt noted that NBC was requesting \$75,000 per year to further research the issue of a stormwater rate structure.⁷²

F. David Aimen, The Louis Berger Group.

In his pre-filed testimony, Mr. Aimen discussed the potential impact on NBC ratepayers of implementing a stormwater fee system to assist in funding the CSO project.⁷³ According to Mr. Aimen, who is employed by Berger, “a stormwater fee suffers from several defects that make it not feasible for implementation as the primary means for raising revenues and assigning burden responsibility for funding the CSO project.”⁷⁴

First, “a stormwater-based system will likely shift the burden from residential users to non-residential users” because non-residential users generally have more impervious surface area than residential users.⁷⁵ Second, “NBC may not have the authority at the present time to charge users in the stormwater separated areas” of its service territory.⁷⁶ Third, a “stormwater based system singles out the lower income segment—the residents of Central Falls, Pawtucket and Providence” because these communities have the largest

⁷¹ Id.

⁷² Id., p. 10.

⁷³ NBC Ex. 6: Aimen’s Pre-filed Testimony, pp. 2-3.

⁷⁴ Id., p. 4.

⁷⁵ Id.

⁷⁶ Id.

number of low-income families in NBC's service territory and these three communities contain all the combined sewer systems which give rise to the need for a CSO project.⁷⁷ Fourth, a stormwater rate design would shift CSO project costs to non-residential users in combined sewer areas and as a result "introduces a cost factor" in these urban communities which could conflict with efforts to attract business or promote urban redevelopment.⁷⁸ Fifth, a "stormwater Management and Utility District (SMUD) is a more appropriate authority for implementation of stormwater billing system," because NBC is concerned that it may not have the authority to impose a stormwater charge on users in separated sewer system areas.⁷⁹ Sixth, a stormwater billing system "would be administratively burdensome for NBC to implement," because NBC would need to collect information on users' impervious surface coverage.⁸⁰ Seventh, a stormwater fee "would be insufficient financial incentive for homeowners to install or adopt runoff reducing mechanisms or behaviors".⁸¹

Mr. Aimen also concluded that a "surcharge-based fee system" imposed upon "select industrial and commercial ratepayers who are exceptional generators of stormwater or who do not presently pay a large sewer bill" would be administratively burdensome for NBC, and that NBC could still lack "jurisdictional authority" to impose such a surcharge on "a user who generates stormwater runoff but does not have an NBC wastewater account."⁸²

⁷⁷ Id., p. 5.

⁷⁸ Id., p. 6.

⁷⁹ Id., p. 8.

⁸⁰ Id., pp. 6-7.

⁸¹ Id., p. 8.

⁸² Id., pp. 8-9.

G. Karen Geibink, NBC's Director of Administration & Finance.

In her pre-filed testimony, Ms. Giebink provided background information supporting NBC's proposed conversion to a flat fee rate structure for residential customers.⁸³ Ms. Giebink noted that 70,800 of NBC's 78,500 accounts are residential users. From 1988 to 1994, NBC charged residential users both a flat fee and consumption fee, with a built-in allowance for consumption that did not exceed 200 gallons per day ("gpd").⁸⁴ In 1994, after the former Blackstone Valley District Commission ("BVDC") was merged into the NBC, a single rate structure was adopted pursuant to which (i) Field's Point residential users in the original NBC territory were converted to a flat fee plus consumption fee (and the 200 gpd allowance was eliminated), and (ii) Bucklin Point residential users in the original BVDC territory were converted from a flat fee to a flat fee plus consumption fee.⁸⁵ Ms. Giebink further testified that a majority of the water meter readings on which NBC's consumption charges are based are supplied by the Providence Water Supply Board and the Pawtucket Water Supply Board, but the meter readings obtained from the Providence Water Supply Board are poor and unreliable.⁸⁶ As a result of these inaccurate meter readings, consumption billing errors occur which increase the workload of NBC's customer service staff due to the number of billing disputes.⁸⁷ Ms.

⁸³ NBC Ex. 7: Giebink's Pre-filed Testimony, p. 2.

⁸⁴ Id., pp. 2-3.

⁸⁵ Id., pp. 3-4.

⁸⁶ Id., pp. 4-5.

⁸⁷ Id., pp. 6-7.

Geibink testified that conversion from a consumption fee to a flat fee for residential users would eliminate these billing problems. Ms. Giebink emphasized that consumption billing would still be retained for commercial and industrial users, and that NBC would support a return to a consumption-based rate structure for residential users once Providence Water Supply Board completed its meter replacement program.⁸⁸ In conclusion, Ms. Giebink noted that an average single family home would pay approximately \$178.44 under the proposed flat fee structure instead of \$180.73 under the current rate structure.⁸⁹

H. Lisa Jeffries, NBC's Customer Service Manager.

In her pre-filed testimony, Ms. Jeffries provided information related to NBC's proposed conversion to a flat fee billing for residential customers.⁹⁰ Ms. Jeffries stated that during the last fiscal year approximately 47% of the preliminary consumption data from the Providence Water Supply Board was deleted prior to being calculated for billing on NBC's system. Also, NBC received many meter readings from Providence Water Supply Board which overestimated or underestimated water consumption, as well as meter readings for closed accounts.⁹¹ As a result NBC was required to investigate these billing problems through a site visit to read the meter and to review Providence Water Supply Board's records for consumption information.⁹² Ms. Jeffries reported

⁸⁸ Id., pp. 8-9.

⁸⁹ Id., p. 10.

⁹⁰ NBC Ex. 8: Jeffries' Pre-filed Testimony, p. 2.

⁹¹ Id., pp. 2-3.

⁹² Id., p. 4.

that 1,000,000, or 67%, of consumption revenue billed by NBC in fiscal year 1999 was adjusted for accounts serviced by Providence Water Supply Board. Furthermore, she noted that some 250-450 NBC accounts are put into dispute every month and that 90% of these billing disputes relate to problems with consumption data.⁹³

II. DIVISION

In response to NBC's filing, the Division of Public Utilities and Carriers ("Division") submitted the pre-filed testimony of its consultant, Thomas S. Catlin, of Exeter Associates, Inc. In his pre-filed testimony, Mr. Catlin evaluated NBC's general rate filing. Mr. Catlin summarized his findings by stating NBC was entitled to a revenue increase of \$6,040,380 for an overall revenue requirement of \$35,939,145, and recommended that NBC's existing rates be increased on a uniform percentage after eliminating the differential in rates between the Bucklin Point and Field's Point service areas. He explained that his recommended revenue increase was \$4,049,061 less than the revenue increase requested by NBC due to various adjustments he made to revenues, expenses and debt service costs claimed by NBC in its rate filing.⁹⁴

In the case of industrial revenues, Mr. Catlin disagreed with Mr. Edge's \$330,000 reduction in test year revenues to reflect the loss of three large customers. Mr. Catlin determined that Mr. Edge had overestimated by \$88,587 the revenue loss attributable to these customers, and had not made

⁹³ Id., pp. 4-5.

⁹⁴ Division Ex. 1: Catlin's Pre-filed Testimony, p. 4.

appropriate adjustments for the continuation of some revenues from Elizabeth Webbing and the recognition of Providence Place Mall as a new, large customer. Accordingly, Mr. Catlin recalculated industrial revenues for the rate year at \$1,937,705, representing an increase of \$152,121 over the rate year industrial revenues claimed in NBC's filing.⁹⁵ As for miscellaneous revenue, Mr. Catlin increased Mr. Edge's projection of \$988,442 by \$212,987 to reflect actual miscellaneous revenues received by NBC in fiscal year 2000.⁹⁶ In regard to late payment revenue, Mr. Edge calculated the amount to be \$550,000. Initially, Mr. Catlin reduced the total by \$15,398 to reflect NBC's average late payment revenues over the most recent three years, but then increased late payment revenues by \$116,109 to account for the likely increase in NBC's late payment revenues following the rate increase anticipated from this proceeding.⁹⁷

In regard to the amortization of Y2K expenses, Mr. Catlin noted that NBC proposed an annual amortization allowance of \$438,342 to recover deferred Y2K costs totaling \$1,315,027 incurred in fiscal years 1998, 1999 and 2000. Because the Y2K costs were significant non-recurring costs from a prior period that were already paid for by NBC's general revenues, however, Mr. Catlin recommended disallowance of the proposed deferral and amortization of NBC's Y2K expenses, and reduced rate year expenses by \$438,342.⁹⁸ For the item of NEXTEL telephone costs, Mr. Catlin decreased NBC's rate year expense by

⁹⁵ Id., pp. 5-7.

⁹⁶ Id., pp. 7-8.

⁹⁷ Id., pp. 8-9.

⁹⁸ Id., pp. 9-11. Mr. Caitlin noted that, because NBC operates on a cash basis, even with all Y2K costs included as expenses rather than being deferred, NBC's revenues in the FY 1999 test year were sufficient

\$6,150.⁹⁹ As for wage related expenses, Mr. Catlin decreased the total rate year amount by \$67,334 due to turnover and a lower than 10% state benefit rate.¹⁰⁰ For health insurance costs, Mr. Catlin decreased Mr. Edge's rate year amount by \$100,899 because nine NBC employees waived health insurance coverage; Mr. Catlin also calculated the annual premium to be \$6,963 per employee instead of \$7,215 as determined by Mr. Edge.¹⁰¹ As for sludge handling expense, Mr. Catlin reduced the rate year amount by \$15,089 because average disposal quantities for the last two instead of three fiscal years was more representative of NBC's current operations.¹⁰² Also, in the area of bad debt expense, Mr. Catlin reduced the rate year amount by \$118,186 by applying the audited bad debt expense ratio from the test year to projected rate year revenues.¹⁰³ In the area of other repair expenses, Mr. Catlin reduced the NBC's test year expense amount by \$45,274 because some repair expenses would not be in effect for the entire rate year.¹⁰⁴

As for debt service, Mr. Catlin disagreed with NBC's proposal to fund the average debt service cost for the three-year period 2001 through 2003, and instead recommended that the allowance for debt service expense be based upon the lower average debt service cost for the two-year period 2001 and 2002. Mr. Catlin also recommended that NBC be allowed to file abbreviated

to recover NBC's Y2K costs. He also noted that NBC's rate year cost of service includes \$467,000 for additional computer systems improvements.

⁹⁹ Id., p. 11.

¹⁰⁰ Id., p. 12.

¹⁰¹ Id., p. 13.

¹⁰² Id., pp. 14-15.

¹⁰³ Id., pp. 15-16.

¹⁰⁴ Id., pp. 16-17.

rate filings to recover increased debt service associated with additional bond issuances subsequent to the \$17.6 projected for 2001 and the \$35.4 million projected for 2002.¹⁰⁵ Using a two-year average as Mr. Catlin recommended reduces the annual debt service expense by \$2,490,397, with a corresponding reduction in the coverage allowance of \$371,548.¹⁰⁶ Given the magnitude of NBC's proposed Information Technology costs over the next 3 years, Mr. Catlin recommended these costs be treated as a capital requirement and be accounted for as part of the restricted capital outlays account.¹⁰⁷ Also, Mr. Catlin agreed with NBC's proposal to eliminate restricted accounts, Mr. Catlin indicated that he did not oppose elimination of restricted accounts relating to operating expenses, but recommended that the restricted accounts for except capital outlays, replacement reserve and debt service be retained.¹⁰⁸

Lastly, regarding rate design, Mr. Catlin agreed with NBC's proposal to eliminate the differential between rates in the Field's Point and Bucklin Point service areas, but opposed NBC's proposal to convert to flat fee billing for residential customers.¹⁰⁹ Mr. Catlin cautioned that elimination of all charges based on consumption would eliminate any conservation incentive to customers and might adversely impact the bills of residents with lower than average water consumption or residents of multi-family housing units.¹¹⁰ Mr. Catlin noted, however, that if Providence Water's conversion to automatic meter

¹⁰⁵ Id., pp. 17-19.

¹⁰⁶ Id., p. 20.

¹⁰⁷ Id.

¹⁰⁸ Id., pp. 20-21.

¹⁰⁹ Id., pp. 21-22.

¹¹⁰ Id., pp. 22-23.

reading units does not eliminate most of NBC's problems with consumption data supplied by Providence Water, NBC could ask the Commission to revisit the issue of flat fee billing.¹¹¹ In conclusion, Mr. Catlin recommended that NBC uniformly increase all existing flat and measured usage rates by 21.72%.¹¹²

III. NBC's REBUTTAL

In response to the Division's pre-filed testimony, NBC filed the rebuttal testimony of its consultant, Mr. Edge. Mr. Edge accepted the Division's normalizing adjustment to NBC's industrial revenue, which was further reduced by \$32,788; miscellaneous operating income adjustment, which was reduced by \$7,445; and miscellaneous income adjustment, which was reduced by \$15,000.¹¹³ Mr. Edge also noted that the Division and NBC agreed to compromise on late charge penalty revenue by further reducing the amount by \$1,852.¹¹⁴ Also, Mr. Edge accepted the Division's expense adjustments, with the following modifications: reducing net personnel services by \$16,663; increasing total operating supplies and expenses by \$25,627; and increasing the debt service coverage allowance by \$673,847. Mr. Edge accepted the Division's \$2,490,397 reduction in the debt service allowance to reflect an average of two years, rather than three years, of debt service costs. However, Mr. Edge noted that calculating debt service requirements using a two-year average, while reducing the annual debt service expense, results in a

¹¹¹ Id., p. 23.

¹¹² Id., pp. 21-22.

¹¹³ NBC Ex. 2A: Edge's Rebuttal Pre-filed Testimony, p. 1.

¹¹⁴ Id.

mandatory increase in the debt service coverage allowance from 15% to 25%, or \$673,847. As a result, Mr. Edge recalculated NBC's revenue requirement by increasing the Division's cost of service by \$693,064 to \$36,632,209.¹¹⁵ NBC's revised position reflects a decrease of \$3,006,287 in its original cost of service filed in this docket, and corresponds to a revised revenue increase of approximately \$6.8 million, or 23%.

IV. INTERVENTION REQUESTS

On July 27, 2000, Mr. Greg Gerritt filed a motion to intervene in this proceeding on grounds that he is a ratepayer of NBC opposed to NBC's proposal to convert residential customers from a consumption-based to a flat fee rate structure. On August 2, 2000, NBC objected to Mr. Gerritt's motion on the grounds that it did not set forth facts demonstrating that his interest would not be adequately represented by the Division. On August 8, 2000, Mr. G. Dale Dulgarian, on behalf of the Krikor S. Dulgarian Trust, filed a request to intervene on the grounds that the trust is a ratepayer of NBC and that issues of concern to the trust regarding the CSO project are not adequately represented in this proceeding. On August 21, 2000, NBC objected to Mr. Dulgarian's motion on the grounds that the petitioner is not an attorney and cannot represent a trust in this proceeding and that, in any case, the trust's interests are adequately represented by the Division. At an open meeting on August 30, 2000, the Commission denied Mr. Gerritt's motion to intervene on the grounds that his interests are adequately represented by the Division and denied Mr.

¹¹⁵ Id., p. 3; Schedule NBC-1.

Dulgarian's motion to intervene on the grounds that he is not an attorney and cannot represent a trust in these proceedings.

On November 1, 2000, the Attorney General of the State of Rhode Island filed a motion to intervene to address issues related to ensuring that the CSO project stays within or below the budget of \$227 million for Phase I. Under the common law, the Attorney General noted, it is the representative of the public empowered to bring actions to redress grievances suffered by the public as a whole. On November 6, 2000, NBC objected to the Attorney General's motion to intervene on grounds that the motion is untimely because it was filed after the deadline to file motions to intervene and extensive discovery had already occurred. The presiding commissioner granted the motion to intervene, finding that the Attorney General represents the public and such intervention would serve the public interest; provided, however, that pursuant to the Commission's Rules of Practice and Procedure, the Attorney General would be bound to the procedural schedule established in this docket prior to the Attorney General's intervention.

V. THE SETTLEMENT AGREEMENT

Following notice, public hearings for the purpose of taking public comment were conducted at North Providence Town Hall on September 28, 2000, at the Public Utilities Commission on October 2, 2000, and at Pawtucket City Hall on October 16, 2000. Numerous comments were received from members of the public criticizing NBC's proposal to change residential billing from a consumption-based fee to a flat fee. NBC and the Division subsequently

reached an agreement on NBC's rate filing, and on November 27, 2000 they jointly filed a Settlement Agreement ("Settlement") with the Commission¹¹⁶.

In the Settlement, the Division and NBC agreed to a total rate year revenue requirement for NBC of \$36,632,209, resulting in a rate increase of \$6,669,489, or 24.5%, in NBC's fixed and consumption-based fees effective January 1, 2001. NBC agreed to continue to bill residential customers under its existing consumption-based rate structure. The Division and NBC concurred that the amount of revenue to be generated from miscellaneous sources will increase by \$261,544 to \$2,696,136. Noting that a very significant portion of the agreed upon rate increase results from the level of funding provided for NBC's CIP, particularly for the CSO project which is estimated to cost \$227 million for Phase I, the settling parties agreed that (1) the approval of the rate increase does not constitute approval by the Division or adjudication by the Commission of the issue of costs for Phase I, II or III of the CSO project, and (2) the Division reserves all its rights with respect to the cost of the CSO project. Furthermore, the settling parties agreed that NBC shall file a report with the Division and Commission every six months regarding all of its capital programs , noting the status of each project for which Requests for Proposals have been issued, the projects started, the projected start and/or completion date of each project, the funds expended to date on each project and the estimate of funds needed to complete each project. If any of the projects are delayed beyond the year indicated in the report, NBC shall note the reasons for

¹¹⁶ A copy of the Settlement is attached as Appendix A hereto and incorporated by reference herein.

the delay, and if any significant additional capital projects costing \$20,000 or more are undertaken, these projects must also be reported in the manner specified in the Settlement.

The settling parties also agreed to allow NBC to unrestrict all of its Operations and Maintenance accounts. However, NBC will continue to restrict all of its Debt Service and Capital Outlay accounts (including Replacement Reserve accounts), and maintain all of its Debt Service (including debt service coverage) in a separate, restricted account. Also, NBC was directed to explore using unrestricted capital outlays as part of the debt service coverage allowance calculation and to file a report every six months with the Division and the Commission on the funding of and expenditures in the Commission-mandated restricted accounts associated with debt service and capital outlays.

On November 14, 2000, the voters approved Question 2 on the Rhode Island ballot authorizing the State of Rhode Island to issue its General Obligation Bonds and refunding bonds not exceeding \$60 million to provide funding for Rhode Island Clean Water Finance Agency, which will be leveraged with federal and state capitalization grants to provide loans at a subsidized rate of zero percent to entities such as NBC. The settling parties acknowledged that it is unclear at this time as to what extent the voters' approval of Question 2 will affect the current rate filing. Accordingly, the settling parties agreed that the Division reserves all of its rights at any and all future proceedings regarding the impact of the approval of Question 2 upon the terms of the Settlement Agreement.

A. Public Hearings.

Public evidentiary hearings on the proposed Settlement were conducted at the offices of the Commission, 100 Orange Street, Providence, Rhode Island, on November 28, 29, and 30, 2000. The following appearances were entered:

FOR NBC:	Peter J. McGinn, Esq.
FOR DIVISION:	Leo Wold, Esq. Special Assistant Attorney General
FOR ATTORNEY GENERAL:	Paul Roberti, Esq. Assistant Attorney General
FOR COMMISSION:	Steven Frias, Esq. Senior Legal Counsel

1. Rate Increase.

At the hearing, two witnesses were called to testify in support of the Settlement, Mr. Edge for NBC and Mr. Catlin for the Division. According to Mr. Catlin, the most significant change to NBC's filing reflected in the Settlement related to the decrease in the debt service allowance from three years to two years. This change resulted in a significant decrease in the annual debt service expense from the amount filed by NBC which, in turn, reduced the size of the rate increase required by NBC.¹¹⁷ In addition, Mr. Catlin pointed out that receipt of zero percent interest loans from RI Clean Water Finance Agency due to passage of Question 2 could also reduce the amount of NBC's debt service. Since debt service revenues are retained in a restricted account, the

¹¹⁷ Tr. 11/28/00, pp. 99, 103.

Commission could address any over-recovery in a subsequent proceeding. Mr. Catlin also pointed out that the reduced level of debt service agreed to in the Settlement will require NBC to return to the Commission sooner to obtain further revenues for debt service at an appropriate level.¹¹⁸

2. Stormwater Rate.

On this issue, the Division presented Mr. Catlin as its witness. Under questioning by the Commission, Mr. Catlin stated that the Division is not claiming that the “best way to recover” the CSO project costs “is through the existing rate structure.”¹¹⁹ He pointed out that CSO project costs are not at this time a significant portion of NBC’s total revenue requirement for the next two years, but will grow over time.¹²⁰ However, he acknowledged that “somewhere in a two-to-four year time horizon” a decision needs to be made as to whether to alter the rate structure to pay for the CSO project, and that he “personally” thought “there are some merits to having a broader based stormwater charge that recovers the costs from more than just NBC’s existing customer base.”¹²¹ Mr. Catlin concurred that there are parking lots and entities with large impervious surfaces that are contributing to the need for a CSO project.¹²² Mr. Catlin stated that the Commission could address in this docket the expectation that NBC would return to the Commission in a certain amount of time to inform the Commission as to how NBC is “going to develop a

¹¹⁸ Id., pp. 147-148.

¹¹⁹ Id., p. 192.

¹²⁰ Id., pp. 192-193.

¹²¹ Id., 195-196.

¹²² Id., pp. 196-197.

stormwater assessment fee.”¹²³ Mr. Catlin agreed that “at some point in the future” it “would be fair to have at least some component of the CSO project” to be “paid for with a stormwater assessment fee”.¹²⁴ Mr. Catlin said that it would be “reasonable to have a cost study to look at cost responsibility for the CSO project.”¹²⁵ Also, Mr. Catlin concurred that a “stormwater system would put less of a financial burden on the average residential customers” than NBC’s “current rate design” in regard to paying for the CSO project.¹²⁶ Mr. Catlin concurred that NBC should consider having “legislation enacted . . . to spread the burden” of paying for the CSO Project to those entities who contribute to stormwater runoff but are not presently customers of NBC.¹²⁷ Furthermore, Mr. Catlin agreed that if legislation cannot be enacted to expand NBC’s current ratepayer base to pay for the CSO project, then the Commission must “create a stormwater fee and charge” those customers “who are on the system for NBC”.¹²⁸ Lastly, Mr. Catlin stated that the “intuitive obvious answer” is that customers that do not utilize “combined sewers” should have a lower “cost responsibility” for the CSO Project, but suggested that the Commission would have to consider a number of policy and equity issues in connection with this subject matter.¹²⁹

NBC presented Mr. Aimen as its witness regarding stormwater rate design.

¹²³ Id., pp. 201.

¹²⁴ Id., p. 209.

¹²⁵ Id., p. 210.

¹²⁶ Id., p. 212.

¹²⁷ Id., pp. 217-218.

¹²⁸ Id., pp. 212-214.

¹²⁹ Id., pp. 221-222.

Mr. Aimen admitted the existence of a group of entities, such as parking lots, that are not currently NBC customers but which contribute to the need for the CSO project.¹³⁰ He also acknowledged that adding this group of so called “free riders” to the NBC customer base would spread the cost of the CSO project among more entities.¹³¹ Also, Mr. Aimen concurred that under four of the six stormwater billing scenarios presented in his study, a residential ratepayer in Providence, Pawtucket and Central Falls would pay less under a stormwater billing system using NBC’s current billing system format.¹³² Mr. Aimen noted that other communities expended have \$100,000 or less to implement a stormwater billing system.¹³³ Also, Mr. Aimen concurred that if legislation were enacted to add “free riders”, such as parking lots, to the NBC system, under certain scenarios the bills to NBC’s residential customers would be reduced.¹³⁴ Lastly, Mr. Aimen agreed that cost contribution is a factor in crafting a rate design to pay for the CSO project.¹³⁵

3. Independent Oversight of CSO Project.

At the hearing, the Attorney General urged the Commission to consider including “some independent audit function” or “some independent oversight” as part of the “rate process” for the CSO project.¹³⁶ The Attorney General subsequently elaborated that NBC’s ratepayers should fund “an independent

¹³⁰ Tr. 11/30/00, pp. 100-101.

¹³¹ Id., pp. 102-103.

¹³² Id., pp. 116, 151. Mr. Aimen’s stormwater assessment fee study was prepared at the direction of NBC.

¹³³ Id., pp. 152-153.

¹³⁴ Id., pp. 162-165.

¹³⁵ Id., p. 167.

¹³⁶ Tr. 11/28/00, pp. 7, 9.

auditor...that would have a responsibility to monitor the costs” and “the bidding” related to the CSO project.¹³⁷ The Division responded to this proposal with the testimony of its Chief Accountant, Stephen Scialabba. He stated that he “was not quite sure what” was the “scope of the work” of the independent auditor proposed by the Attorney General. He pointed out that the CSO project will be overseen by Louis Berger and Associates, Gilbane and Jacobs Associates, and that the Division’s staff would also monitor the CSO project.¹³⁸ It was also unclear to him how much an independent auditor would cost. Furthermore, he stressed, the Division could later on, if it “felt the need”, retain an independent auditor.¹³⁹ Mr. Scialabba speculated that the Attorney General’s independent auditor might be a “second construction manager” to oversee Gilbane and Jacobs Associates.¹⁴⁰ Counsel for NBC expressed the opinion that the CSO project will be properly overseen by Louis Berger and Associates and Gilbane and Jacobs Associates, along with the NBC and Division staffs.¹⁴¹

To explain the CSO project and the mechanisms in place to oversee it, NBC presented Joseph Pratt of the Louis Berger Group as a witness. Mr. Pratt stated that the work performed for the CSO project will be procured according to the public competitive bidding process as required by state law.¹⁴² Mr. Pratt explained the bids received could be higher or lower than the projected costs of

¹³⁷ Id., p. 68.

¹³⁸ Id., pp. 70-71.

¹³⁹ Id.

¹⁴⁰ Id., pp. 80-81.

¹⁴¹ Id., pp. 72-73.

¹⁴² Tr. 11/29/00, p. 17.

the CSO project, but if there is a recession lower bids will likely be submitted.¹⁴³ Mr. Pratt emphasized that “major tunnel projects” such as the CSO project “tend to come in five to ten percent over the engineer’s estimate” and, therefore, Phase I of the CSO project would likely cost more than the current estimate of \$227 million.¹⁴⁴ Mr. Pratt speculated that the greatest risk of cost escalation for Phase I of the CSO project would be “bad rock” that would hinder the excavation of the tunnels.¹⁴⁵ Mr. Pratt elaborated that several firms have been retained by competitive bidding to perform the tunnel design and other engineering tasks.¹⁴⁶ Mr. Pratt noted that Louis Berger and Associates, the CSO project manager, as well as all general contractors to be selected, have been or will be selected through a competitive bidding process.¹⁴⁷ Louis Berger and Associates will evaluate and make recommendations to NBC as to which bids to accept for the CSO project.¹⁴⁸ To reduce costly delays, the CSO project has a Disputes Review Board, which is an independent body that will observe the progress of the CSO project and rapidly resolve disputes which may arise.¹⁴⁹

At the conclusion of the hearings, counsel for the Division informed the Commission that the Division will “dedicate [from] its current in-house staff, at least one individual . . .to monitor the terms of the settlement agreement”

¹⁴³ *Id.*, pp. 32, 36.

¹⁴⁴ *Id.*, pp. 44, 66.

¹⁴⁵ *Id.*, pp. 84-85.

¹⁴⁶ *Id.*, p. 47.

¹⁴⁷ *Id.*, p. 59-60.

¹⁴⁸ *Id.*, pp. 38-39.

¹⁴⁹ *Id.*, pp. 55-56.

between the Division and NBC regarding the CSO project.¹⁵⁰ The Division will “review the reports” filed by NBC related to the CSO project and “take a proactive stance” with NBC relating to “the progress of the construction of the CSO”.¹⁵¹ The Division also noted that it has requested a full time engineering position in its current budget and is prepared to request an additional full time engineering position in next year’s budget “to monitor the CSO project”.¹⁵²

VI. POST-HEARING MEMORANDA

Following the conclusion of the hearings, the parties filed post-hearing memoranda with the Commission on two issues raised during the hearings: (1) whether NBC has the authority to impose a stormwater fee on persons or entities not directly connected to the NBC system, and (2) the need for independent oversight of the CSO project. The Division also filed direct testimony of its Engineering Specialist, Alberico Mancini, relating to NBC’s two principal non-CSO capital improvement projects: Field’s Point and Bucklin Point.

A. NBC.

In its post-hearing memorandum, NBC stated that it is not authorized to assess stormwater fees to customers or non-customers in its district. NBC explained that R.I.G.L. § 46-25-5 and § 46-25-3(10) empower NBC to “make assessments and impose reasonable user charges as necessary for

¹⁵⁰ Tr. 11/30/00, pp. 244-245.

¹⁵¹ Id., p. 245.

¹⁵² Id.

maintenance” and operation of “any sewage treatment facility.”¹⁵³ NBC argued that it “is immediately apparent that NBC is not specifically empowered by the governing statute to assess user charges for treatment of stormwater and the case law interpreting user charges . . . do not include such charges to customers or non-customers of the utility”.¹⁵⁴ NBC concluded that “if NBC were to implement a stormwater fee system, the statute governing NBC’s assessment powers should be amended to specifically authorize implementation of stormwater fees.”¹⁵⁵

In regard to the Attorney General’s proposal regarding independent oversight of the CSO project, NBC argued that appointment of an independent third party to perform such oversight would be duplicative, expensive and impractical, and would improperly infringe upon the management decisions of NBC’s Board of Commissioners. NBC explained that “all significant contracts” of “Phase I of the CSO project are subject to competitive bid” under R.I.G.L. §§37-2-1 to 76.1.¹⁵⁶ NBC noted that the “Louis Berger Group will serve as the Program Manager” and a “joint venture of Gilbane/Jacobs Associates” will “serve as Construction Manager” and that there will also be a Disputes Review Board.¹⁵⁷ Furthermore, NBC pointed out that pursuant to the Settlement, “the Division has reserved all rights to review the CSO Project’s costs” and that NBC must file CSO project status reports every six months with the Division and the

¹⁵³ NBC’s Post-Hearing Memorandum, p. 1.

¹⁵⁴ Id., p. 3.

¹⁵⁵ Id.

¹⁵⁶ Id., p. 4.

¹⁵⁷ Id., p. 4-5.

Commission.¹⁵⁸ With these safeguards in place, NBC emphasized that the appointment of an independent third party to oversee the CSO project would “constitute an illegal intrusion upon the function of management,” as well as “an ill-advised expenditure.”¹⁵⁹

B. DIVISION

In its post-hearing memorandum, the Division interpreted R.I.G.L. §46-25-21 as allowing NBC to “assess any person having a direct or an indirect connection” to NBC’s sewage treatment plant.¹⁶⁰ After reviewing Rhode Island case law and the case law from other jurisdictions, the Division concluded that NBC can only assess fees upon persons whose property is connected through a sewer line to NBC’s sewage treatment plant.¹⁶¹ Thus, absent “express statutory authority,” NBC “cannot assess a reasonable stormwater fee on persons that are not directly or indirectly connected” to NBC’s “facilities”.¹⁶²

As for the need for independent oversight of the CSO project, the Division stated “that retention of an outside expert consultant is premature at the time”.¹⁶³ The Division noted that Louis Berger and Associates, as well as Gilbane/Jacob Associates, have “extensive knowledge and experience,” and that the “Division, through its engineering section will be actively engaged” in monitoring the status of the CSO project “as well as being apprised on a timely

¹⁵⁸ Id., p. 5.

¹⁵⁹ Id., p. 6.

¹⁶⁰ Division’s Post-Hearing Memorandum, p. 2.

¹⁶¹ Id., pp. 3-4.

¹⁶² Id., p. 6.

¹⁶³ Id., p. 7.

basis of problems” that may occur.¹⁶⁴ Moreover, the Division pointed out, pursuant to R.I.G.L. §§39-1-19 and 39-1-26, it was authorized to engage outside consultants at any time. The Division also expressed concern that under the Attorney General’s proposal, the scope of work to be undertaken by an independent third party “overseer” was unclear.¹⁶⁵

The Division also submitted the prefiled testimony of Alberico Mancini, an Engineering Specialist for the Division, regarding NBC’s proposed improvements to its Bucklin Point and Field’s Point Treatment Facilities.¹⁶⁶ Mr. Mancini explained that Bucklin Point needs to be upgraded because it only treats a maximum flow rate of 60 million gallons per day (mgd), with the excess being diverted into the Seekonk River.¹⁶⁷ In addition, other significant upgrades at Bucklin Point will be undertaken to create a more reliable and efficient operation and to assist the facility in meeting future EPA and DEM regulations.¹⁶⁸ Regarding the Field’s Point, Mr. Mancini explained that NBC had recently reached an agreement with the RI Resource Recovery Corporation (“RIRRC”) for the disposal of NBC’s liquid sludge at a new regional sludge disposal facility to be constructed and operated by RIRRC.¹⁶⁹ Once the new disposal facility is constructed and operational, NBC will demolish its existing Filter Building, Interim Solids Handling Building and abandoned incinerator, but the existing incinerator will be maintained as a back-up means of sludge

¹⁶⁴ Id.

¹⁶⁵ Id., pp. 7-8.

¹⁶⁶ Division Ex. 3: Mancini’s Pre-filed testimony, p. 2.

¹⁶⁷ Id., p. 3.

¹⁶⁸ Id., p. 4.

¹⁶⁹ Id.

disposal.¹⁷⁰ In conclusion, Mr. Mancini recommended that funding be made available for these treatment facility projects.¹⁷¹

C. ATTORNEY GENERAL

In its post-hearing memorandum, the Attorney General concurred with the Division that “NBC cannot assess property owners that are not connected to NBC’s system” with a stormwater charge.¹⁷² The Attorney General recommended, however, that legislation be enacted “to broaden the current ratepayer base” of NBC “in order to pay” for the CSO project as well as expedite the implementation of a pilot stormwater attenuation program.¹⁷³

In regard to the issue of independent oversight of the CSO project, the Attorney General stated that he “does not agree with the Division’s position that it is premature in this docket to fund through rates an independent third party to assist the Division and Commission with their task of monitoring the design and construction of Phase I of the CSO.”¹⁷⁴ The Attorney General recommended that this independent third party perform the following tasks:

- (a) Ensure that established budget targets for the CSO project are fair and reasonable;
- (b) Monitor the design and construction of the CSO project to ensure budget targets are met both in terms of cost and timeliness;
- (c) Perform appropriate investigative field work and document review;

¹⁷⁰ Id., p. 5.

¹⁷¹ Id.

¹⁷² Id., pp. 5-6.

¹⁷³ Attorney General’s Post-Hearing Memorandum, p. 2.

¹⁷⁴ Id., p. 2-3. On November 24, 2000, in response to Commission data requests, the Attorney General supported a “cost allocation and rate design development that properly and fairly distributes the costs of the CSO facilities to the contributors of the problem” possibly including “some assignment of the costs to the State.”

- (d) Attend critical project meetings by and among the design and construction managers, etc.;
- (e) When design and construction problems arise, ensure that the proposed solutions are implemented at a fair and reasonable cost and in a timely manner;
- (f) Perform due diligence regarding continuing EPA/DEM mandates and NBC obligations;
- (g) Provide the Commission/Division with periodic updates regarding material issues that arise in connection with the CSO project and to provide recommendations with respect to the resolution of these issues; and
- (h) At the proper time, provide the Commission and/or Division with a report evaluating Phase II and Phase III of the CSO project both in terms of need and cost.¹⁷⁵

The Attorney General recommended that the Commission retain an independent firm with “accounting, legal, environmental and engineering knowledge and experience” to perform the tasks described above.¹⁷⁶ Also, the Attorney General expressed concern that Division staff “will not have the time to devote to oversight of the CSO project,” and that it is important “to retain an independent watchdog before the project construction has commenced.”¹⁷⁷ In conclusion, the Attorney General urged that “an expert consultant” be “retained now rather than later,” because the expert “will be fully prepared when the time bomb represented by the [CSO] project’s revised cost estimates confront the ratepayer.”¹⁷⁸

¹⁷⁵ Id., p. 4

¹⁷⁶ Id.

¹⁷⁷ Id., p. 6.

¹⁷⁸ Id., p. 7.

VII. INDEPENDENT OVERSIGHT HEARING

On January 17, 2001, the Commission conducted a further hearing in this docket on the Attorney General's proposal for independent oversight of the CSO project. In support of its recommendation, the Attorney General presented two witnesses, Michael McElroy, Esq., an attorney with experience in utility regulation, and Stephen Garfinkel, a member of an Independent Certified Public Accounting Firm. Mr. McElroy emphasized that the independent overseer¹⁷⁹ of the CSO project "would be the eyes and ears of the PUC" and "provide an overall perspective" on the CSO project.¹⁸⁰ Furthermore, the Commission should retain an entity to oversee the CSO project because the parties involved with the CSO project, such as contractors, "are profit making companies."¹⁸¹ Mr. McElroy also emphasized that the appointment of an independent overseer would enhance public confidence in the expenditures related to the CSO project.¹⁸² Also, Mr. McElroy expressed concern that the Division could not be expected to comprehensively oversee the CSO project because it is not "properly staffed" to do so.¹⁸³ Mr. McElroy explained that an independent overseer would need to possess construction experience, but would not necessarily be an engineer or accountant. Instead, the independent overseer could retain an accountant and or engineer, as needed, to assist in

¹⁷⁹ The term "independent overseer" is used in these proceedings interchangeably with the terms "special master" and "independent auditor," to refer generally to a third party retained by the Commission to provide independent oversight of the CSO project.

¹⁸⁰ Tr. 1/17/01, p. 45.

¹⁸¹ Id., pp. 55-56.

¹⁸² Id., pp. 138-139, 174-175.

¹⁸³ Id., pp. 140-141.

reviewing the CSO project.¹⁸⁴ Mr. McElroy estimated that the Attorney General's proposal for an independent overseer would cost approximately \$100,000 to \$200,000 annually, based upon combining Mr. McElroy's estimate of \$50,000 to \$100,000 for an independent overseer and Mr. Garfinkel's estimate of \$50,000 to \$100,000 for an independent overseer.¹⁸⁵ Mr. McElroy emphasized that for the Commission to retain an independent overseer would not be "unusual," because the Commission and Division have small staffs and can "go outside and get help" and does so "frequently in other cases."¹⁸⁶ He envisioned the "primary role" of an independent overseer to be "reporting to the Commission" as to the progress of the CSO project.¹⁸⁷ Mr. McElroy expressed concern that the Division as currently staffed could not "review the procedure for the CSO project or quickly report to the Commission about ongoing problems that may arise with the CSO project," and therefore an independent overseer should be retained.¹⁸⁸ In conclusion, Mr. McElroy noted the independent overseer would "alert" the Commission with respect to any issues that may cause the CSO project to "exceed budget" and act as an "early warning for problems."¹⁸⁹

Mr. Garfinkel explained that an independent overseer could either be or utilize an accountant who would provide a combination of services referred to

¹⁸⁴ *Id.*, pp. 160-162.

¹⁸⁵ *Id.*, p. 165.

¹⁸⁶ *Id.*, p. 167.

¹⁸⁷ *Id.*, p. 171.

¹⁸⁸ *Id.*, pp. 178-179.

¹⁸⁹ *Id.*, pp. 200-201.

as review, audit, and agreed upon procedures.¹⁹⁰ Mr. Garfinkel was personally familiar with the auditing of construction contracts, and testified that the “premise” of the audit would be to look at “the structure of the accounting system” as well as “the internal controls of those policies and procedures.”¹⁹¹ Therefore, Mr. Garfinkel explained, the auditor would “report on internal controls” and determine if they are “inadequate or not functioning as they should or as they are designed.”¹⁹²

NBC presented Mr. Pratt as its witness to rebut the testimony of the Attorney General’s witnesses. Mr. Pratt noted that the tasks to be performed by the independent overseer outlined in the Attorney General’s post-hearing memorandum are currently being, or will in the future be, primarily performed by some twenty to fifty individuals connected to Louis Berger and Associates, Gilbane/Jacobs Associates, NBC and the Disputer Review Board, and therefore, in his view, could not be performed by any one individual.¹⁹³

The Division presented Mr. Mancini as its witness. Mr. Mancini explained the Division could “review construction schedules”, “monitor certain change orders and design changes”, and report to the Commission on a periodic basis.¹⁹⁴ Furthermore, the Division and Mr. Mancini specifically could do “independent investigatory work” and perform work “instructed” by the Commission.¹⁹⁵ Lastly, Mr. Mancini emphasized that the Division’s

¹⁹⁰ Id., pp. 74, 84-85.

¹⁹¹ Id., pp. 93, 97-98.

¹⁹² Id.

¹⁹³ Id., pp. 214-220, 222.

¹⁹⁴ Id., pp. 259-262.

¹⁹⁵ Id., pp. 270-271.

recommended “monitoring process” would not incur any additional costs to the ratepayer.¹⁹⁶

On January 19, 2001, after the conclusion of the hearings, the Division filed a letter with the Commission outlining its final position on the Attorney General’s recommendation regarding independent oversight of the CSO project. The Division stated that “it is not in the ratepayers best interest to increase the revenue requirement now to pre-fund” an independent overseer “for the CSO abatement project”.¹⁹⁷ The Division elaborated that it had “struggled to understand the role and functions” of the Attorney General’s recommended independent overseer for the CSO project, and that the Attorney General had failed to adequately define the position and failed to prove that it “will add any value for the ratepayers”.¹⁹⁸ The Division was “not persuaded” that the engagement of an independent overseer “would ultimately result in lower costs to complete the project”, and re-emphasized that “the primary responsibility for the design and construction” of the CSO project rests with NBC.¹⁹⁹ Lastly, the Division expressed concern that the “Attorney General’s still vague recommendation will somehow shift responsibility for the management of the CSO abatement project to the Commission or Division”, and re-iterated that “NBC’s track record” indicates “a competent administrative and engineering staff, aided by a qualified national engineering firm and an experienced

¹⁹⁶ Id., p. 272.

¹⁹⁷ Division’s Letter dated 1/19/01, p.1.

¹⁹⁸ Id.

¹⁹⁹ Id., p.2.

construction manager to oversee the completion of the CSO abatement project.”²⁰⁰

COMMISSION FINDINGS

A. THE SETTLEMENT

At open meetings on January 19 and 24, 2001, the Commission considered the evidence presented in the case and approved the Settlement as just and reasonable and in the best interest of the ratepayers, with certain modifications, including a requirement that NBC report quarterly to the Commission regarding the status of its capital improvement projects, including the CSO project and the Bucklin Point project. The Commission’s findings regarding its other modifications to the Settlement are set forth in sections B and C, below.²⁰¹ .

B. STORMWATER RATE STUDY

The Commission noted that a large portion of NBC’s rate increase is due to the significant costs of the CSO project. The Commission has a duty under R.I.G.L. § 39-1-1 to set just and reasonable rates. In an effort to fulfill its statutory obligation, the Commission is interested in studying the establishment of a stormwater rate in order to pay for the CSO project. It is undisputed that the need for the CSO abatement project arises from stormwater runoff into the combined sewer areas of NBC’s service territory,

²⁰⁰ Id., pp.2-3.

²⁰¹ As more fully discussed in section C of the Commission’s Findings, the Commission majority also restricted \$150,000 from NBC’s operating reserves to fund the hiring of an independent overseer for the CSO project.

and that the primary contributors to stormwater runoff are entities with large impervious surface areas. NBC's present rate design is based on metered water usage, however, and not on contribution to stormwater runoff. Consequently, under NBC's present rate structure, entities that are significant contributors to stormwater runoff overflow problem are not assessed their share of the cost of abating the problem to which they have contributed. The purpose of a stormwater rate would be to require entities with significant impervious surface runoff to bear a reasonable share of the cost of the CSO abatement project. In the Commission's view, equitable considerations lead to the inescapable conclusion that such entities should be required to bear their "fair share" of the CSO abatement costs .

The Attorney General espoused positions in these proceedings favorable to implementing a stormwater rate structure. Specifically, the Attorney General advocated that the Commission take a proactive stance by seeking to expand the present NBC ratepayer class to include "free riders", and to develop a stormwater attenuation program. In addition, the Division's witness, Mr. Catlin, emphasized that *within two to four years* the implementation of a stormwater rate for the NBC service territory needs to be seriously considered, because the increasing costs of the CSO project will be reflected in increasingly larger bills to NBC's ratepayers. In the study presented by NBC's witness, Mr. Aimen, it was demonstrated that under four of six scenarios, NBC's residential ratepayers would pay proportionally *less* of the CSO project costs under a stormwater rate structure than under NBC's present rate structure.

Furthermore, under all six scenarios residential ratepayers in separated sewer system areas would pay *less* of the CSO project costs under a stormwater rate structure than under NBC's present rate structure.

At a minimum, the Commission is interested in having "free riders" pay their fair share of the costs of the CSO project. The Commission defines a "free rider" as an entity that significantly contributes to stormwater runoff in a combined sewer area due to its impervious surfaces and yet, is not currently a ratepayer of NBC (or pays a token fee). For instance, many parking lots in Providence are likely "free riders". Unfortunately, the Commission recognizes that many of these "free riders" are not directly connected to the NBC system and, therefore, cannot be assessed a stormwater fee by NBC without the appropriate enabling legislation. NBC has commissioned a number of studies regarding the potential for instituting a stormwater fee, but none have attempted to determine the extent of "free ridership" in its service territory or how much the rates for NBC's present ratepayers would be reduced if these "free riders" were assessed their fair share of the CSO project costs.

Consequently, the Commission directs NBC to utilize the \$75,000 annual allowance for stormwater studies provided for in its approved cost of service as follows. In consultation with the Division, NBC will select an independent consultant to perform a study to determine the impact on NBC's present ratepayers if all contributors to stormwater runoff in its service territory, including "free riders," were charged a stormwater fee to pay for the completion of Phase I the CSO project. This study shall be based on actual data collected

by NBC with regard to the impervious surface areas in its service territory. A copy of said study shall be filed with the Commission and Division by November 1, 2001. Lastly, NBC is directed to update the Commission and Division regarding the retention of this consultant and the progress made on said study.

The Commission views this study as a necessary step in determining whether a stormwater rate should be implemented to pay for the CSO project. Even if the present base of NBC ratepayers is not broadened by legislation, the Commission reserves the right in a subsequent rate case or by opening a rate design docket to establish a stormwater rate for NBC's present ratepayers.

C. INDEPENDENT OVERSIGHT OF CSO PROJECT

When the Attorney General intervenes in a Commission proceeding, the Commission gives great weight to the position espoused by the Attorney General. In this proceeding, the Attorney General has intervened to recommend that the Commission at the outset establish an independent oversight process for the CSO project. In support of this recommendation, the Attorney General presented Mr. Garfinkel, an independent certified public accountant with experience in auditing construction contracts, who testified that an independent CPA could be retained by the Commission to perform a review of the internal controls NBC has in place for the CSO project. We also note that the Division, although opposed to the Attorney General's recommendation, observed that pursuant to R.I.G.L. §39-1-19 and R.I.G.L.

§39-1-26, it retains the right to hire experts and consultants to assist the Division in monitoring the CSO project.

The Commission notes that R.I.G.L. §39-1-19 and R.I.G.L. §39-1-26 can and are being utilized by the Commission to retain experts and consultants. Indeed, by law, the Commission has great discretion and latitude in hiring experts and consultants. Pursuant to R.I.G.L. § 39-1-19, the Commission, in order to perform its regulatory duties, may “retain and employ experts, consultants and assistants on a contract or other basis for rendering legal, financial, professional, technical or other advice or assistance.” Under R.I.G.L. § 39-1-26(b), a public utility “shall pay” for “expenses reasonably incurred by the commission” for “the employment” of “engineers, accountants and expenses” which are “reasonably attributable” to the regulation of the utility and the amount “charged to any public utility under authority of the section” for “any calendar year shall not exceed one hundred sixty thousand dollars (\$160,000) for any calendar year.” Presumably, the Commission primarily need only show that the retainment of an expert or consultant will assist the Commission in performing its regulatory duties and that the retainment of such an expert or consultant is in the public interest.

In the Commission’s view, a consultant or expert retained by the Commission to provide independent oversight of the CSO project would not attempt to usurp the managerial prerogatives of the utility or be vested with decision making or management authority over the CSO project. Rather, the function of an independent overseer will be to monitor the CSO project and

advise the Commission as to its progress and any problems therewith. The Commission expects that an independent overseer will, among other things, provide a review of the internal controls NBC has in place for the CSO project, as well as monitor the bidding process for the CSO project and inform the Commission as to which bids NBC has selected and the reasons why NBC selected those particular bids. However, the Commission recognizes that selection of the winning bids remains within the sole managerial prerogative of NBC.

The Division maintains that it can monitor the CSO project and report to the Commission and therefore, an independent overseer is not necessary. The Commission certainly acknowledges that the Division is a state agency that is independent of NBC and the construction firms involved in the CSO project. However, the Division and the Commission may have different areas of concern and interest regarding the monitoring of the CSO project. Furthermore, the Commission has no authority over which consultant the Division may choose to retain or to direct whatever investigations or actions the Division staff or its consultants shall perform. For instance, the Division has indicated that it does not support the hiring of an expert or consultant at this time to monitor the CSO project; however, the Commission believes that a proactive step at this time in providing funding for the engagement of an independent overseer would best serve the public interest.

Accordingly, the Commission finds that it is in the public interest to retain such experts and consultants as it deems appropriate, pursuant to

R.I.G.L. §39-1-19 and R.I.G.L. §39-1-26, to provide independent oversight of the CSO project. The Commission will in due course specify the nature of the duties or tasks such experts and consultants will be expected to perform, and requests that the Attorney General assist the Commission in developing specifications for an RFP for this purpose.

To provide funding for the independent oversight of the CSO project, the Commission orders that \$150,000 be restricted annually from the 1-1/2% operating reserve provided for in the Settlement Agreement, and that such amount shall be set aside for use by the Commission to fund the independent oversight of the CSO project. Historically, the Commission has set NBC's operating reserves at approximately 1% of its revenues, but in the current Settlement this percentage was increased to approximately 1-1/2%, or \$541,363. The restriction of ½% or approximately \$150,000 of this reserve as directed above will not harm NBC because, historically, a 1% operating reserve has been sufficient. Furthermore, the Commission emphasizes that, contrary to the concerns of the Division, the adoption of this funding mechanism for the independent overseer will not require an increase in the revenue requirements set forth in the Settlement or otherwise require a further increase in NBC's rates. In other words, the ratepayers will have the benefit of independent oversight of the CSO project without incurring any rate increase other than that already provided for in the Settlement.

In conclusion, the Commission emphasizes that the amount of money that will be set aside from ratepayer funds (\$150,000) to provide for

independent oversight of the CSO project simply pales in comparison to costs of at least \$227,000,000 to be paid by NBC's ratepayers for Phase I of the CSO project. We believe that \$150,000 per year is a relatively small price to pay to help ensure that the CSO project does not become a financial black hole for NBC's ratepayers. Vigilance comes with a cost. Under these circumstances, the price of providing independent oversight of the CSO project may well prove to be a bargain for NBC's ratepayers.

Accordingly, it is

(16751) ORDERED:

1. The June 29, 2000 general rate filing by the Narragansett Bay Commission is hereby denied and dismissed.
2. The Settlement Agreement filed on November 27, 2000, providing for a revenue increase for the Narragansett Bay Commission of \$6,669,489 for a total cost of service of \$36,632,209, is hereby approved, and the tariffs filed with the Settlement Agreement are hereby approved for effect at January 29, 2001.
3. The Narragansett Bay Commission shall utilize the annual allowance of \$75,000 provided for in the approved cost of service to provide the Commission with the stormwater rate study described in section B of the Commission's Findings in this Report and Order. A copy of this study will be filed with the Public Utilities Commission and the Division of Public Utilities and Carriers no later than November 1, 2001.

4. The Narragansett Bay Commission will restrict all of its Debt Service accounts in the aggregate amount of \$11,594,467 and its Capital Outlay accounts in the aggregate amount of \$799,469, as specified in the Settlement Agreement. In addition, the Narragansett Bay Commission will restrict \$150,000 annually of its Operating Reserve allowance for use by the Public Utilities Commission to fund independent oversight of the Combined Sewer Overflow Abatement Project as more particularly described in section C of the Commission's Findings in this Report and Order. All restricted amounts are to be used only for the purposes set forth in NBC's filing, as modified by the Settlement Agreement and this Report and Order. Any unspent funds in the restricted accounts shall be carried forward in the designated restricted account for use in a subsequent fiscal period.
5. The Narragansett Bay Commission shall comply with the reporting requirements and all other terms and conditions imposed by the Settlement Agreement and this Report and Order.

EFFECTIVE AT PROVIDENCE, RHODE ISLAND ON JANUARY 19 AND
JANUARY 24, 2001 PURSUANT TO OPEN MEETING DECISIONS. WRITTEN
ORDER ISSUED OCTOBER 25, 2001.

PUBLIC UTILITIES COMMISSION

*Elia Germani, Chairman

Kate F. Racine, Commissioner

Brenda K. Gaynor, Commissioner

*Chairman Germani concurs with this Report and Order except as to Section C
of the Commission's Findings herein, to which he dissents.

Germani, E., concurring in part, and dissenting in part

I concur with the majority decision issued on October 25, 2001, except as it pertains to the restriction of funds in excess of the statutory amount for an independent overseer. Further, while I do not dissent from the concept of the Commission reserving the right to hire experts and consultants if the need arises, with the proper evidence presented and parameters set, I dissented to the actual motion that was carried at the open meeting decision on January 19, 2001. At the open meeting, it was clarified that the motion voted upon and carried was “that the Commission will retain someone rather than the Commission reserves the right to.”²⁰²

I dissent from the majority open meeting decision for four reasons. First, no evidence was presented to show that the Narragansett Bay Commission (“NBC”) had a history of management problems or fiscal irresponsibility. Second, the Attorney General failed to provide adequate evidence that the Division of Public Utilities and Carriers (“Division”) would be unable to adequately perform its statutory function as the “eyes and ears” of the commission in monitoring the Combined Sewer Overflow Abatement Program (“CSO project”). Third, the majority order failed to adequately define the functions, qualifications and costs of an independent overseer which was advocated by the Attorney General.²⁰³ Fourth, there was no evidence presented

²⁰² Tr. Open Meeting 1/19/01, p. 38.

²⁰³ There has been some confusion created by the majority order on this point. At the open meeting, the majority of the Commission voted to restrict funds in order to retain a “special master.” However, the majority order indicates that it reserves the right to retain experts and/or consultants in the future. Given the inconsistency between the

at any hearing to support the Commission's creation of a restricted account, not addressed in the Settlement Agreement, from which to pay an independent overseer. In fact, the novel funding mechanism was not even addressed until the January 19, 2001 open meeting, thus allowing NBC no opportunity to respond to the possibility of a new restricted account.

However, while I concur with the majority decision regarding the right of the Commission to retain consultants, given specific standards and parameters, the majority decision does not adequately address the circumstances under which the Commission would be justified in retaining experts or consultants to oversee the CSO project. Therefore, I cannot sign on to the decision in full. The following opinion provides the legal and policy rationale for my dissent and attempts to provide guidance relative to the possible future hiring of experts or consultants to oversee the management of a project.

I. INTRODUCTION

The Rhode Island General Assembly created two separate entities to regulate certain public utilities.²⁰⁴ The intent was "to 'segregate the judicial and administrative attributes to...utilities regulation and to vest them separately and respectively in the commission and the administrator (or division).'"²⁰⁵ The function of the Public Utilities Commission ("Commission") is to serve as a quasi-judicial body to

majority order and the decision actually made at open meeting, I am relying on the record for purposes of this dissent.

²⁰⁴ R.I.G.L. § 39-1-3.

“...hold investigations and hearings involving the rates...and the sufficiency and reasonableness of facilities and accommodations of ... public utilities.²⁰⁶ According to the Rhode Island Supreme Court, “it is the function of the Division to serve the commission in bringing to it all relevant evidence, facts, and arguments that will lead the commission in its quasi-judicial capacity to reach a just result.”²⁰⁷ Explained another way, [t]he division’s powers include ‘effective administration, supervision and regulation of public utilities....’²⁰⁸ Therefore, it is the role of the Division to be the “eyes and ears” of the Commission.

As the body providing oversight for the Commission, the Division has been authorized by the General Assembly to designate examiners or investigators to make investigations.²⁰⁹ Furthermore, the General Assembly has authorized the Commission or Division to employ experts

whenever the commission or the division shall conduct an investigation or hearing *upon a proposal by a public utility to increase its rates*, tolls, or charges or to issue stocks, bonds, notes or other evidences of indebtedness...to examine into and testify regarding the matters involved and all collateral issues at all hearing and in any appeal procedures until final determination in law has been had.²¹⁰

For example, in the event that NBC filed another petition for an unexpected rate increase, the Commission and Division both have the authority to hire independent investigators when reviewing NBC’s new

²⁰⁵ O’Neil v. Interstate Navigation Co., 565 A.2d 530, 531 (R.I. 1989) (citations omitted).

²⁰⁶ R.I.G.L. § 39-1-3(a).

²⁰⁷ Providence Gas Co. v. Burke, 419 A.2d 263, 270 (R.I. 1980).

²⁰⁸ Interstate Navigation Co., 565 A.2d at 532.

²⁰⁹ See R.I.G.L. § 39-1-15.

²¹⁰ R.I.G.L. § 39-1-20 (emphasis added).

petition. It would also be appropriate to hire an independent investigator if the Division, in the course of its oversight, believed that NBC's actions needed to be scrutinized more closely than the Division could manage or if the Division failed to provide an appropriate level of oversight.

Although I agree that this Commission gives serious consideration to the position taken by the Attorney General, that does not mean that I believe the Attorney General is absolved from presenting sufficient evidence to first, clearly articulate the parameters of his proposal and second, to provide evidence to support the need for his proposal. In this case, neither has occurred.

There was no evidence presented by the Attorney General that the Division is unable to provide the appropriate level of oversight of the CSO project. In addition, the Attorney General's own witness agreed that the Gilbane and Jacobs Associates, Louis Berger Associates and Division staff are quite reputable and "highly qualified."²¹¹ Finally, the Division pointed out that NBC has a history of competent management.²¹² The Attorney General's "evidence" was merely speculation that the Division would not have the resources to carry out its statutory duty.²¹³ Therefore, the creation of an independent overseer is duplicative and constitutes a poor use of ratepayer funds.

II. EVIDENTIARY STANDARDS

²¹¹ Tr. 1/17/01, pp. 45, 141, 153, 168.

²¹² Division's Post-Hearing Memorandum, p. 3.

²¹³ Tr. 1/17/01, pp. 140-41.

In rendering a decision, the Commission must base all of its findings upon substantial evidence. The Rhode Island Supreme Court has stated that in reviewing Commission decisions, the Court must “determine whether the commission’s findings are lawful and reasonable, are fairly and substantially supported by legal evidence, and are sufficiently specific to enable us to ascertain if the evidence upon which the commission based its findings reasonably supports the result.”²¹⁴

It is my opinion that there was not substantial evidence to support the open meeting decision to retain an independent overseer nor is the majority order sufficiently specific to issue a Request for Proposal (“RFP”) for an independent overseer if the need ever arises. Therefore, a reviewing Court would neither be able to determine the legal necessity of an independent overseer at this stage and furthermore, would not be able to determine how to enforce the order of the Commission in terms of whether an independent overseer was acting within his or her authority. Finally, the majority has provided no guidance for determining when an independent overseer would be necessary.

THE STANDARD

In order to justify the need for an independent third party to oversee the management of a utility, at least one of two conditions must be met: (1) the utility must have a history or show evidence of poor management and/or (2) there must be evidence that the Division is

²¹⁴ Violet v. Narragansett Elec. Co., 505 A.2d 1149 (R.I. 1986).

unable to perform its statutory duty.²¹⁵ In this case, all of the evidence presented indicated that NBC has a history of strong management and fiscal responsibility. In addition, no evidence was presented to prove that the Division would be unable to provide sufficient oversight.

Furthermore, this standard is appropriate for determining whether an independent overseer is necessary in the future.

EVIDENCE PRESENTED

After hearings in November 2000, counsel was asked to prepare post-hearing memoranda addressing, in part, the need for an independent overseer. A hearing was subsequently set for January 17, 2001.

In their respective post-hearing memoranda, neither NBC nor the Division believed that the retention of an independent third party was necessary at that time. NBC argued that the evidence presented at the November 29, 2000, hearing “supports the ...conclusion that such an appointment would be duplicative, expensive and impractical and improperly impinge upon the reasonable determinations of NBC’s Management and Board of Commissioners.”²¹⁶ The Division represented that it would be able to sufficiently monitor the project through its

²¹⁵ Order 14096 – Providence Water Supply Board: Rate Increase of \$3,954,955, p. 87 (December 30, 1992). “...the PWSB has displayed, in the opinion of this Commission, very little fiscal responsibility....[w]e note from the record that the Division similarly believes such an audit has become necessary.” *Id.* Furthermore, by allocating funds for the PUC to employ experts and consultants specifically when a utility is requesting a rate increase or is requesting permission to issue further debt, the General Assembly has inferred that authorizing this expense absent evidence of a need for further debt is improper. See R.I.G.L. § 39-1-20.

engineering section. The Division also pointed out that it had the statutory authority to bring in outside experts and consultants, if necessary. Therefore, it would be premature for the Commission to retain an independent third party at that time.²¹⁷ The Attorney General took the position that an independent third party was needed prior to commencement of the project because the Division would be unable to provide adequate oversight.²¹⁸

At the January 17, 2001, hearing the Attorney General failed to present any evidence to show that NBC had a history of poor management or fiscal responsibility. Nor did the Attorney General present any evidence that the Division would be unable to provide the appropriate oversight, in the manner outlined above. The Attorney General presented two witnesses to testify at the hearing. The first, Michael McElroy, Esquire, is a Rhode Island lawyer, who testified as to why he, or an attorney like him, would be the best choice as an independent overseer. The second was Stephen Garfinkel, a CPA, who testified that a CPA firm would be useful in reviewing the annual audits of NBC's accounts. However, neither of these individuals was able to provide evidence to support the Attorney General's request for an independent overseer at this time.

²¹⁶ NBC's Post-Hearing Memorandum, p. 3.

²¹⁷ Division's Post-Hearing Memorandum, pp. 7-8.

²¹⁸ Attorney General's Post-Hearing Memorandum, p. 3, 6.

The Division presented Mr. Alberico Mancini, a Public Utilities Engineering Specialist II for the Division. He testified in detail regarding the ability of the Division to fulfill its duty to be the “eyes and ears” of the Commission on the CSO project.

1. NBC’S MANAGEMENT HISTORY

The evidence presented proved that NBC has a history of strong management and fiscal responsibility. As indicated by the testimony cited in the majority order, NBC has shown fiscal responsibility through the implementation of multiple cost saving measures.²¹⁹ Mr. Pinault, the Executive Director of NBC, also testified that NBC was in the process of streamlining its workforce, in an attempt to further increase efficiency.²²⁰ Furthermore, in a letter from the Division to the Commission, Chief Accountant, Stephen Scialabba noted, “NBC’s track record...indicates a competent administrative and engineering staff, aided by qualified national engineering firm and an experienced construction manager to oversee the completion of the CSO abatement project.”²²¹ *Even the Attorney General* has noted that “NBC has done an exemplary job in cleaning up the Narragansett Bay and in pretreatment and discharge – the pretreatment programs. They’ve done an exceptional job....”²²²

i. THE INDEPENDENT OVERSEER HEARING

Attorney General’s Evidence

²¹⁹ NBC’s Ex. 3: Pinault’s Pre-filed Testimony, pp. 9-16. See Majority Order, p. 4.

²²⁰ *Id.* at 11-13.

²²¹ Division’s Letter dated 1/19/01.

Mr. McElroy testified that he was not suggesting that there would be less than the best experts involved with the CSO project. He stated that the project, as he understood it, would include a “joint venture that’s involved in the construction management as well as the people who are already involved, *certainly very well respected construction managers with very well respected engineers on staff.*”²²³ He stated that he did not know the people involved in the CSO project and was unable to comment on whether they would be able to appropriately provide oversight.²²⁴

On cross-examination, Mr. McElroy further testified that he had no knowledge of the people of NBC or whether there were any particular concerns regarding the management by NBC relative to the CSO project, or any other project.²²⁵ Mr. McElroy believed that the independent overseer should be involved in the competitive bidding process, which he viewed as “an art more than a science.”²²⁶ He testified that the contracts would have to be awarded in accordance with the Rhode Island General Laws governing competitive bidding.²²⁷ However, he believed that an independent overseer should be involved, not because NBC did not have the ability to comply with the law, but rather, because other construction

²²² Tr. 11/28/00, p. 7.

²²³ Tr. 1/17/01, p. 53 (emphasis added).

²²⁴ *Id.* at 53-4.

²²⁵ *Id.* at 61.

²²⁶ *Id.* at 149.

²²⁷ *Id.* at 150.

projects in other states had run into problems.²²⁸ In fact, he stated that he “believe[s] that there is expertise not only at NBC in-house, but with the highly qualified companies that they have brought in to be construction managers and contract managers...”²²⁹ Furthermore, he agreed that “there is no lack of engineering and financial expertise for the project.”²³⁰

Finally, Mr. McElroy was unaware of “any large construction project in the United States...” which hired a special master or independent overseer before there was any indication that a project was far exceeding its budget.²³¹ Therefore, the Attorney General presented a witness who was unable to provide any evidence regarding an inability on the part of NBC to oversee the CSO project or provide any evidence of when another agency has required an independent overseer at this earliest stage of a project.²³²

NBC’s Evidence

NBC presented Joseph Pratt, Vice President of Louis Berger Group, Inc., which is providing management services for the CSO project, to respond to the concerns of the Attorney General. He explained that there

²²⁸ Although Mr. McElroy had no involvement with those projects, he felt the cost overruns could have been avoided. Id.

²²⁹ Id. at 149-50.

²³⁰ Id. at 168.

²³¹ Id. at 156.

²³² The Attorney General’s other witness, Mr. Garfinkel, was not questioned regarding the ability of NBC to undertake appropriate measures to manage the CSO project. His

were supervisory engineers on staff to assist in monitoring the design and construction of the project.²³³ These people, in conjunction with General Pratt, would evaluate whether the engineer's estimate was reasonable.²³⁴ He stated that members of the entire project team (between 20 and 50 people) including his employees, designers and construction managers, have been involved in investigatory fieldwork on other projects and would be able to perform them for this project.²³⁵

He testified that he expected to have members of the project team at all meetings because all meetings have the potential of becoming critical.²³⁶ He reiterated earlier testimony, in which he explained the existence of a disputes resolution board to evaluate and decide matters of design and construction problems as they arise.²³⁷ He further indicated that NBC has been working to ensure compliance with the EPA and DEM. He stated that his firm also provides assistance in such matters where necessary.²³⁸

Although none of these functions include reporting to the Division or Commission, that is the duty of NBC. In fact, the reporting requirements are set forth in the Settlement Agreement between NBC and the Division. Furthermore, it is up to the Division to keep the

testimony focused entirely on the type of role a CPA could undertake if participating in an oversight position.

²³³ Id. at 214-15.

²³⁴ Id.

²³⁵ Id. at 215-16.

²³⁶ Id. at 216-17.

²³⁷ Id. at 217-19.

²³⁸ Id. at 219.

Commission apprised as well. Regardless, NBC has hired Louis Berger Group, Inc. which is prepared to, and in fact, does routinely undertake all of the duties proposed by the Attorney General.

Finally, General Pratt testified that in “[a]ll my experience with the federal government in the construction and in the private sector on smaller jobs in Rhode Island, I’ve never seen [a special master to oversee the project manager of the entire project].”²³⁹ Therefore, there was no evidence presented to indicate that an independent overseer should be retained to oversee the project manager at this stage of a project.²⁴⁰

ii. THE JANUARY 19, 2001, OPEN MEETING

The record clearly shows that the Attorney General did not present any evidence to the effect that NBC cannot properly manage the CSO project. NBC has no history of poor management and no history of fiscal irresponsibility. Furthermore, the majority did not rely on any evidence, either at the open meeting or in the order, when determining whether this standard was met. Rather, the majority relied on statements made by the Attorney General, *although his own witness supported the position that NBC and the entities retained for the project are very well respected and have a history of doing “an exceptional job.”*

Although the point regarding NBC’s competency level was raised at the open meeting, the majority indicated that the evidence was not the

²³⁹ Id. at 229.

compelling factor. Rather, the setting aside of money for an independent overseer was based solely on a request from the Attorney General's Office.²⁴¹

The majority clearly regarded the evidence indicating the solid reputation of NBC as irrelevant, given the fact that one member of the majority noted, "I have a great respect for NBC and the job that they do. They are an award winning entity and yes, they are very capable of carrying out their duties as is the Division, more than capable."²⁴² Furthermore, the majority order is devoid of any concern that NBC and its internal controls will be unable to properly manage the CSO project. Therefore, in failing to address any concern regarding NBC's ability to adequately manage the project, the Commission did not meet the standard set forth in Violet v. Narragansett Elec. Co.²⁴³

2. DUPLICATION OF DUTIES

Although there was no evidence presented, or relied upon by the Commission regarding NBC's ability to properly manage the CSO project, the retention of an independent overseer might still be appropriate at this stage if the evidence showed that the Division would be unable to carry out its statutory oversight functions.

²⁴⁰ Mr. Alberico Mancini testified on behalf of the Division. He was not questioned regarding NBC's history of management of fiscal responsibility. Rather, the Division cross-examined the Attorney General's witness, as noted above.

²⁴¹ Tr. Open Meeting 1/19/01, p. 28.

²⁴² Id. at 10.

²⁴³ Violet v. Narragansett Elec. Co., 505 A.2d 1149 (R.I. 1986).

In his post-hearing memorandum, the Attorney General stated that Division staff would be too busy to appropriately monitor the program because there would be other matters to handle, whereas a private individual or entity would have enough time,²⁴⁴ presumably because he/she or it, would not have other matters to handle. Therefore, according to the Attorney General, “specific Division personnel” should be assigned “to assist the expert in carrying out his/her duties” because Division personnel would not alone be able to carry out the monitoring process themselves.²⁴⁵

The Attorney General argued that an independent expert was needed before construction commenced so that “he/she will be fully prepared when the ‘time bomb’ represented by the project’s revised cost estimates confront the ratepayer for the first time in a Commission proceeding.”²⁴⁶ It appears from this statement, that the Attorney General was not proposing that the independent overseer be in the position to affect policy or make management decisions in a proactive fashion, but would merely react to various situations that would arise by reporting those incidents to the Commission, *precisely what the Division is statutorily required to do.*

Finally, the Attorney General attempted to outline the qualifications and duties of an independent third party. He believed that

²⁴⁴ Attorney General’s Post-Hearing Memorandum, p. 6.

²⁴⁵ *Id.* at 6.

²⁴⁶ *Id.* at 7.

“the independent third party or firm would need to possess accounting, legal, environmental knowledge and experience.”²⁴⁷ The Attorney General believed that this person or entity should have the following general duties, including:

- (a) Ensure that budget targets for the CSO project are fair and reasonable;
- (b) Monitor the *design and construction* of the CSO project to ensure budget targets are met both in terms of cost and timeliness;
- (c) Perform *appropriate* investigatory field work and document review;
- (d) Attend *critical* project meetings by and among the design and construction managers, etc.;
- (e) When design and construction problems arise, to ensure that the proposed solutions can and are implemented at a fair and reasonable cost and in a timely manner;
- (f) Perform due diligence regarding continuing EPA/DEM mandates and NBC obligations;
- (g) Provide the Commission/Division with periodic updates regarding material issues that arise in connection with the CSO project and to provide recommendations with respect to the resolution of these issues; and
- (h) At the proper time, provide the Commission and/or Division with a report evaluating Phase II and Phase III of the CSO project both in terms of need and cost.²⁴⁸

i. THE INDEPENDENT OVERSEER HEARING

Attorney General's Evidence

Mr. McElroy speculated that the independent overseer would be able to act as the eyes and ears of the Commission by providing an

²⁴⁷ Id. at 4.

²⁴⁸ Id. at 4.

overall perspective regarding the progress of the project to the Commission.²⁴⁹ Mr. McElroy testified that “[a] special master would be an oversight person who would be assisting in any way that he or she could and then making advisory recommendations and reports only.”²⁵⁰ He did concede on cross-examination, that the Division could also be called the eyes and ears of the Commission.²⁵¹ Furthermore, on cross-examination, Mr. McElroy testified that “I’m not saying that the Division would not be able to carry out this role if the Division was properly staffed to do so.”²⁵²

However, no evidence was presented to show that the Division was not properly staffed to carry out its role. In fact, Mr. McElroy conceded that he had no knowledge regarding whether the Division had set out procedures or increased staffing in anticipation of the CSO project.²⁵³ Mr. McElroy also conceded that the Division staff was capable of carrying out all of the proposed functions listed in his pre-filed testimony regarding the scope of duties of an independent overseer.²⁵⁴ His main concern was that an independent overseer was needed because the parties involved in the CSO project “are profit making companies.”²⁵⁵

²⁴⁹ Id. at 45.

²⁵⁰ Tr. 1/17/01, p. 65.

²⁵¹ Id. at p. 135.

²⁵² Id. at pp. 140-141.

²⁵³ Id. at 144.

²⁵⁴ Id. at 152.

²⁵⁵ Id. at 55-6.

However, Mr. McElroy conceded on cross-examination, that the Division was an independent entity and its personnel could oversee the project.²⁵⁶

The Attorney General also presented Mr. Garfinkel. He testified to the specific types of accounting procedures that could be provided during oversight of the CSO project. Mr. McElroy then testified that he would expect an independent overseer to retain the services of an outside accountant to assist in carrying out these oversight functions.²⁵⁷ The Division already has accountants on staff and the statutory authority to retain the services of outside experts to assist in the administration and enforcement of Commission Orders, if necessary.²⁵⁸

Division's Evidence

Mr. Mancini provided testimony regarding the ability of the Division to oversee the CSO project. He stated, "the Division feels at this point in time that we can monitor ourselves the process of the ongoing process of the CSO project...."²⁵⁹ The Division's plans for monitoring the

²⁵⁶ *Id.* at 175.

²⁵⁷ *Id.* at 161-62.

²⁵⁸ R.I.G.L. § 31-1-15.

²⁵⁹ Tr. 1/17/01, p. 259. In fact, in the time between the hearings and the issuance of the majority order, Alberico Mancini, on behalf of the Division, has been attending meetings and staying apprised of the developments of the CSO project. Four contracts have been negotiated, construction began in June 2001 and at least one contract is 75% complete. Finally, according to Mr. Mancini, NBC is holding a board meeting on November 5, 2001, to decide to whom the award for the largest project (and the final contract) of Phase I will be awarded. The estimated cost of the Main Spine Tunnel and Ancillary Facilities contract was \$180 million. According to Mr. Mancini, information he has received indicates that two of the three bids are at or lower than the estimated cost.

Therefore, the Division has shown, over the last nine (9) months, that in the absence of an independent overseer, it is performing its statutory duty of advising the Commission of the status of the CSO project. Furthermore, the Division is performing the exact tasks the majority expected of an independent overseer. In retrospect, there was no urgency to hire an independent overseer, despite comments made and the motion that was carried on January 19, 2001.

project included, the reviewing of construction contracts, establishing contacts at NBC, visiting the work site, reviewing construction schedules, monitoring the progress of the project, monitoring change orders and design changes, and monitoring the progress of payments.²⁶⁰ Mr. Mancini also testified that he could undertake independent investigatory work, could attend important meetings, and could act as a liaison between NBC and the Commission with no additional costs to the ratepayer.²⁶¹ Finally, Mr. Mancini would require formal monthly reports from NBC and would then report to the Commission on a quarterly basis.²⁶² Therefore, the Division is able to meet all of the general standards proposed by the Attorney General.²⁶³

ii. THE JANUARY 19, 2001, OPEN MEETING

The evidence clearly shows that the Division is ready and able to carry out the oversight duties as set forth in the Attorney General's post-hearing memorandum. Thus, the retention of an independent overseer is duplicative of the duties of the Division and, therefore, a poor use of ratepayer funds.

This issue was raised at the open meeting. It was noted that the Division pointed out its statutory obligation to oversee the project and its

it was noted by a member of the majority that the Division engineers, accountants and other staff were capable of carrying out its statutory duties.²⁶⁴ Not only did I not find any evidence to support the assertion that the Division would be unable to provide the *adequate* oversight, the issue is not even addressed in the majority order.²⁶⁵

One member of the majority indicated that she saw the position as an advisory position, where the person would be “keeping an eye on things for the Commission.”²⁶⁶ This is precisely the role of the Division. The majority also discussed the fact that the position of a “special master” would consist of keeping the Commission apprised of the activities of NBC, including reporting and whatever issue that may arise as the project moves forward. This is also a duplication of the duties of the Division.²⁶⁷

A member of the majority stated that her concern was that the Division would be unable to provide the oversight because it is often a party before the Commission.²⁶⁸ Such a statement infers that the Division could never carry out its statutory oversight function, despite

²⁶³ See *supra* n. 46 and accompanying text for an itemization of the Attorney General’s general standards.

²⁶⁴ “I put Mr. Mancini, John Bell, all of the Division up against anybody out there in the private sector making far more than they are and they could do the job.” Tr. Open Meeting, 1/19/01, p. 10.

²⁶⁵ The majority order does reference undefined areas of concern that may differ from those of the Commission. Majority Order, p. 49. This ignores the fact that the Division is charged with serving the Commission through, among other things, the effective administration and supervision of public utilities in order that both agencies may look out for the best interests of the ratepayers.

²⁶⁶ *Id.* at 16.

²⁶⁷ *Id.* at 11.

²⁶⁸ *Id.* at 30.

the fact that the majority acknowledges that the Division is independent of all parties involved in the CSO project.

The only evidence presented on this issue was positive evidence by the Division, setting forth the procedures they are going to implement (with or without an independent overseer) to appropriately oversee the project in conformance with the recommendations by the Attorney General. The Attorney General presented insufficient evidence to rebut this testimony. There was no *evidence* presented to show that the Division would be unable to carry out this role. Conjecture and statements by the Attorney General are not evidence. Therefore, the retention of an independent overseer is duplicative of the statutory duties the Division is ready and able to carry out. Therefore, the creation of such a position constitutes a poor use of ratepayer funds. Again, by disregarding the positive evidence in favor of conjecture by the Attorney General, the majority did not meet the standard set forth in Violet v. Narragansett Elec. Co.²⁶⁹

III. CREATION OF AN UNDEFINED POSITION

When rendering an order regarding the creation of a new position, the Commission has a duty to provide a clear definition and scope of that position. Otherwise, there is no way to either implement or enforce the parameters of the position.

²⁶⁹ Violet v. Narragansett Elec. Co., 505 A.2d 1149 (R.I. 1986).

There was insufficient evidence upon which to define the nature of the Attorney General's request for an independent overseer. In fact, even the Attorney General was unable to provide one consistent definition upon which to make a determination. Furthermore, the majority failed to define the position or to set forth parameters for the position upon which it was voting during the Open Meeting. Therefore, they were voting to adopt something they had not even defined. Finally, the majority order failed to provide sufficient parameters regarding the nature of the position being created because the majority order does not even address the issue of an independent overseer, but rather, addresses the issue of restricting funds in order to retain some sort of experts and/or consultants at some point.²⁷⁰

The Attorney General first requested the creation of some "independent audit function."²⁷¹ Counsel requested "some independent oversight."²⁷² He stated that this position would not be to second guess NBC on "engineering and design issues," but on costs of the projects and compliance with the state bidding procedures.²⁷³ Counsel further indicated that he was requesting "...some type of auditor, an independent auditor outside of the Narragansett Bay Commission that would have a responsibility to monitor the costs, the bidding, the bids that come in. In other words, send a canary into the mine with the workers and to

²⁷⁰ Majority Order, p. 50.

²⁷¹ Tr. 11/28/00, p. 7.

²⁷² Id. at 9.

highlight, to let us know if the project costs are going to jump up substantially....”²⁷⁴ Essentially, on November 28, 2000, the Attorney General was seeking some sort of something to do some sort of monitoring and/or auditing of the CSO project.

In part, because witnesses were unable to determine the nature of the position upon which they were being asked to comment, counsel for all parties were asked to provide post-hearing memoranda, regarding, in part, the independent overseer issue.²⁷⁵ The Attorney General indicated that it was not “premature in this docket to fund through rates an independent third party to *assist the Division* and Commission with their task of monitoring the design and construction of Phase I of the CSO.”²⁷⁶ The Attorney General set forth proposed duties²⁷⁷ and opined that “[t]he independent *party or firm* that is retained by the Commission and/or Division to monitor the CSO project will need to possess accounting, legal, environmental and engineering knowledge and experience.”²⁷⁸

This independent party or firm is referred to as a “watchdog” over the project.²⁷⁹ The argument is that this watchdog should be hired now so that *when* the time bomb explodes, he, she, or it can advise the Commission.²⁸⁰ Therefore, this *person or entity*, this watchdog requested

²⁷³ *Id.* at 8.

²⁷⁴ *Id.* at 68.

²⁷⁵ *See Id.* at 145-46.

²⁷⁶ Attorney General’s Post-Hearing Memorandum, p. 1 (emphasis added).

²⁷⁷ *See supra* note 46.

²⁷⁸ Attorney General’s Post-Hearing Memorandum, p. 4 (emphasis added).

²⁷⁹ *Id.* at 6.

²⁸⁰ *Id.* at 7.

by the Attorney General appears to have a bark, but no teeth. Rather than being a proactive warning like a canary, it is merely just watching over things and barking when they get out of hand.

Despite this position, the Attorney General's witness appears to have a somewhat different view of the functions of the independent overseer. He felt that the position should be given to a lawyer, such as himself, with the ability to hire consultants as he deemed necessary.²⁸¹ In his pre-filed testimony and in his live testimony, Mr. McElroy indicated that he saw the independent overseer as providing *evaluations* of particular bids *during* the bidding process.²⁸²

However, during live testimony, he stated that his view of the functions of the independent overseer "...depend on what the Commission wanted the special master to do." He stated that "...the toughest decision that the Commission is going to have to face is the scope of the work."²⁸³

The witness stated that "...the special master would be the eyes and ears of the PUC...[to] provide an overall perspective on the project."²⁸⁴ However, in doing so, he expected that the independent third party would provide the parties involved with insights and perspectives on the bidding process and during other phases of construction.²⁸⁵ He believed the independent third party would be able to stop a problem

²⁸¹ Tr. 1/17/01, p. 162.

²⁸² Pre-Filed Testimony of Michael McNulty, Tr. 1/17/01, p. 2 (emphasis added).

²⁸³ Tr. 1/17/01, p. 40.

before it arose because he would have an overall perspective on the process.²⁸⁶ Furthermore, he testified that he expected the duties of the independent overseer to change over the course of the project.²⁸⁷

Because the Attorney General, his witness nor any of the other witnesses were able to discern the exact nature of the proposed independent overseer, it was up to the Commission to determine the need for such a person or entity and if the need existed, the scope of the position. Because the majority of the Commission has determined that they would like an independent overseer, we again turn to the open meeting for guidance regarding the nature of this independent overseer.

A. THE JANUARY 19, 2001, OPEN MEETING

At the January 19, 2001, open meeting, members of the majority noted that the Division had raised concerns regarding the nature and scope of an independent third party. I also raised concerns regarding the scope of the position. The response from one member of the majority was, “[h]ow do I as a Commissioner just walk away and say, ‘Do you know what, Attorney General? I hear you, but you really haven’t defined it.’”²⁸⁸ This member of the majority also stated, “...all right, Attorney General, if you feel that we need *another set of eyes and ears*, I’m willing to go there and I’m willing from a Commission perspective to hire this

²⁸⁴ Id. at 45.

²⁸⁵ Id. at 47.

²⁸⁶ Id. at 47-49.

²⁸⁷ Id. at 146. Again, the witness testified that he was unable to comment on the scope of the work because the Commission still needed to define it. Id.

²⁸⁸ Tr. Open Meeting, 1/19/01, p. 8.

individual as a consultant, a master, an ombudsman, whatever....”²⁸⁹ Furthermore, she stated, “I want to do what I’m asked to do when the Attorney General asks me as a Commissioner to do everything I can to put in place the necessary means of responsibility and answer to the ratepayers.”²⁹⁰

The other majority Commissioner stated that she saw the position “as an advisory person who would be keeping an eye on things for the Commission.”²⁹¹ Furthermore, she stated, “We don’t have to have a list of what that person is going to do because it just has to be sufficient that we feel it’s appropriate.”²⁹² Therefore, the parameters of the position of “special master” were not made clear at either the hearing or at the open meeting.

Not only are these assertions vague in scope, but again, there is no way these are not a duplication of Division activities. Specifically, there are questions regarding how the person or entity is supposed to gather the information and provide the information to the Commission. There is no basis from these statements upon which to issue an RFP. Furthermore, it leaves open the question of the level of involvement the person would have with the project.

The majority order provides little clarification. In fact, the majority appears to be stating that rather than hiring an independent overseer, as

²⁸⁹ *Id.* at 9 (emphasis added).

²⁹⁰ *Id.* at 11-12.

²⁹¹ *Id.* at 16.

indicated at the open meeting, they are simply restricting money and reserving the right to retain experts and consultants as the project progresses. The majority order states, “[t]he Commission will in due course specify the nature of the duties or tasks such experts and consultants will be expected to perform, and requests that the Attorney General assist the Commission in developing specifications for an RFP for this purpose.”²⁹³

The motion upon which the Commission ruled coupled with the evidence should have been clear enough to create an RFP from the voluminous record of testimony produced in this proceeding. Therefore, it is clear there was no evidence regarding the parameters of the position and that the majority of the Commission was unfortunately relying too heavily on the vague recommendation of the Attorney General.

Finally, the majority of the Commission has failed to address the weight that will be given to the reports provided by “its consultants” over the reports provided by the Division. Given the fact that the Division has an obligation to provide information to the Commission in the same manner as an independent overseer as it is now loosely defined, it is unclear what would happen if there were a difference of opinion regarding elements of the project.

IV. RESTRICTION OF FUNDS

²⁹² *Id.* at 20.

²⁹³ Majority Order, p. 50.

At the last minute, the majority restricted \$150,000 from NBC's operating reserves in order to pay for the possible retention of an independent overseer. However, this method of funding was never raised prior to the January 19, 2001 open meeting. It was not contained in the settlement between the Division and NBC and in fact, the money was unrestricted in the settlement that was approved by the majority of the Commission in ordering paragraph number 2.

The majority does note that it is a novel funding approach. It is novel because it circumvents the system set in place for rate filings. If NBC did not need the use of the \$150,000, then it never should have been approved in settlement.²⁹⁴ In my opinion, the majority of the Commission has exceeded its authority in unilaterally restricting an account absent a hearing on the issue.

Furthermore, the majority has exceeded its authority by expanding the level of funds available beyond the scope of a clearly worded statute. The General Assembly has defined the level of reasonable expenses that may be passed on to the utility for investigatory purposes.²⁹⁵ *The maximum amount that may be charged to a utility under the authority of R.I.G.L. § 39-1-26(b) \$160,000 in a calendar year.*²⁹⁶ The majority of the Commission has indicated in the majority order that, because it fears the Division will use up all of the money in carrying out its statutorily required oversight, it is increasing that amount to \$310,000. This includes the \$160,000 already allowed as the

²⁹⁴ Furthermore, the General Assembly has already set aside \$160,000 for use by the Division and/or the Commission to use for investigations within one calendar year, at the expense of the utility. R.I.G.L. § 39-1-26.

maximum reasonable charges by the General Assembly plus another \$150,000 in excess of the maximum allowed by law.²⁹⁷ There is no authority in the Rhode Island General Laws authorizing the Commission to increase the maximum allowed level of spending assessed against the utility. Therefore, given the lack of opportunity presented to NBC to respond to a last minute surprise restriction of funds, the majority of the Commission not only exceeded its statutory authority, but denied NBC due process.

V. CONCLUSION

However, as I stated at the outset, I agree that the Commission has the authority to retain experts and consultants to oversee special projects where the evidence proves that either the company is mismanaging its funds or where the Division is unable to carry out its oversight functions, either alone or with consultants hired by it. Unfortunately, this was not the motion made and carried at the January 19, 2001 open meeting.

Elia Germani, Chairman

Dated, October 26, 2001

²⁹⁵ R.I.G.L. § 39-1-26.

²⁹⁶ R.I.G.L. § 39-1-26(b).

²⁹⁷ Majority Order, p. 48.